

Script for Initial Closure Hearing

(1) United States or Defense files "Request for Closed Session[s] under Military Rule of Evidence 505(j)(5) and Rule for Courts-Martial 806(b)(2)

(2) Military Judge sets a hearing to discuss whether trial will be closed;

(3) Moving party outlines what testimony/evidence they would like to present in a closed session; other party responds; military judge makes findings

TC/DC: Ma'am, the (United States)(Defense) requests a closed session under MRE 505(j)(5) and RCM 806(b)(2) to present classified testimony/evidence during (this Article 39(a) session)(the trial).

MJ: May I see the government request?

MJ: The government wishes to present classified evidence in support of its request, is that correct?

TC: Yes, Ma'am.

MJ: Defense, do you have any objections?

DC:

MJ: I will now close the court. I will call a recess, and when we return, the only personnel in the courtroom will be the accused, (# ____) defense counsel, (# ____) trial counsel, the court security officer, those personnel detailed to the defense and prosecution teams, the representatives of the relevant government agencies, the Military Judge's support paralegal, the Court Reporter, and myself. The audio and video feeds to the media center and the theater will be severed.

MJ: The court is in recess.

(CONDUCT CLOSED SESSION DRILL)

MJ: This Article 39(a) session is called to order. Let the record reflect that we are now in a closed Article 39(a) session. The audio and video feeds to the media center and the theater have been severed. The audio and video feeds to the Defense and Government support trailers are not severed, and only properly cleared members of the defense and prosecution teams are in the trailer. The only personnel in the courtroom are the accused, (# ____) defense counsel, (# ____) trial counsel, the court security officer, the accused, those personnel detailed to the defense and prosecution teams, the representatives of the relevant government agencies, the Military Judge's support paralegal, the Court Reporter, and myself.

TC: This closed Article 39(a) session is classified _____ (state highest expected classification level)."

TC/DC: Ma'am, the (United States)(Defense) requests you close the proceedings for (the testimony of the introduction of) under MRE 505(j)(5) and RCM 806(b)(2)

MJ: On what grounds?

TC/DC: The (United States)(Defense) has reason to believe (the testimony/the evidence) may disclose classified information. The (United States)(Defense) anticipates that the testimony/evidence will disclose information relating to (provide an unclassified summary of the classified testimony/evidence).

MJ: (United States)(Defense), do you have any objections?

TC/DC:

MJ: Government, can you confirm the information is classified?

TC: Yes, Ma'am. The United States offers (___ memorandum)(security officer) to confirm that this testimony/evidence has been properly classified at the (classification level) level.

(TC hands the documents in question to the court security officer and defense)

TC: The United States is handing you what has been previously marked as Appellate Exhibit (exhibit number) which is the (classification review/memo) for this information.

MJ: Defense, do you have any objection to this exhibit?

DC:

TC: Closing the proceeding is necessary to protect this classified information, an overriding interest specifically enumerated under MRE 505(j)(5). The value of protecting this classified information, the disclosure of which (list each item and give security damage levels for each) [(CONFIDENTIAL: "could reasonably be expected to cause damage to national security") (SECRET: "could reasonably be expected to cause serious damage to national security") (TOP SECRET: "could reasonably be expected to cause exceptionally grave damage to national security")], outweighs the value of an open proceeding. No lesser methods short of closing the proceeding are available. Closure of the proceeding is necessary for the (prosecution to (explain how prosecution intends to use the testimony of each specific witness/each specific piece of evidence- elicit classified testimony, discuss classified information in evidence))(defense to (explain how the defense intends to use the testimony of each specific witness/each specific piece of evidence- elicit classified testimony, discuss classified information in evidence), according to their motion). Furthermore, closure is necessary to ensure the accused receives a fair trial. The United States requests you only close the proceeding for those specific portions of the (testimony/evidence) wherein this classified information may be disclosed. If you authorize a

closed session, the United States requests you make case-specific findings on the record justifying closure, as required under RCM 806(b)(2).

MJ: Defense, would you like to be heard on this matter?

DC:

(IF APPROVED)

MJ: I make the following findings of fact:

(1) that the (evidence/testimony) has been properly classified (classification level) by (agency/person on classification review);

(2) that protecting this classified information is an overriding interest;

(3) that the overriding interest of protecting this classified information will be prejudiced if the proceedings remain open outweighs the value of an open proceeding; and

(4) that other methods of protecting the information were considered, but no lesser methods short of closing the proceeding could be used to protect the overriding interest. The proceeding shall remain closed only for those portions of testimony wherein classified information may be disclosed.

(IF NOT APPROVED)

MJ: [(the document is not properly classified) (protecting this classified information is not an overriding interest) (the overriding interest of protecting this classified information does not outweigh the value of an open proceeding) (other methods of protecting the information will be used (state other methods) ()]

MJ: I will now call a recess, and when we return, all spectators and media will be seated in the gallery, and the audio and video feeds to the media center and the theater will be restored. I will then open the court.

TC: This closed Article 39(a) session was classified *(state highest classification level).*"

MJ: This court is in recess.

(CONDUCT OPEN SESSION DRILL)

MJ: This Article 39(a) session is called to order. Let the record reflect that the court is now open. The audio and video feeds to the media center and the theater have been restored. All

spectators and media are now seated in the gallery. All parties present in the closed trial session are again present.

TC: This portion of the trial is unclassified.

MJ: Prior to opening this hearing, the Court Security Officer secured, in the courtroom safe, all classified material not in use, and the court security officer has completed the courtroom opening checklist. This checklist will be marked as an Appellate Exhibit.

MJ: I make the following findings of fact: (Summarize findings of fact (Unclassified).

Script to Close the Courtroom for Classified Evidence or Argument

TC/DC: Your honor, the (United States)(Defense) move to close the courtroom, under your previous findings concerning this (portion of the witness's testimony)(evidence)(portion of argument).

MJ: I will now close the court. I will call a recess, and when we return, the only personnel in the courtroom will be the accused, (# ____) defense counsel, (# ____) trial counsel, the court security officer, those personnel detailed to the defense and prosecution teams, the representatives of the relevant government agencies, the Military Judge's support paralegal, the Court Reporter, and myself. The audio and video feeds to the media center and the theater will be severed.

MJ: This court is in recess.

(CONDUCT CLOSED SESSION DRILL)

MJ: This Article 39(a) session is called to order. Let the record reflect that we are now in a closed Article 39(a) session. The audio and video feeds to the media center and the theater have been severed. The audio and video feeds to the Defense and Government support trailers are not severed, and only properly cleared members of the defense and prosecution teams are in the trailer. The only personnel in the courtroom are the accused, (# ____) defense counsel, (# ____) trial counsel, the court security officer, the accused, those personnel detailed to the defense and prosecution teams, the representatives of the relevant government agencies, the Military Judge's support paralegal, the Court Reporter, and myself.

TC: This closed Article 39a session is classified _____ (state highest expected classification level)."

Script to Open the Courtroom

MJ: I will now call a recess, and when we return, all spectators and media will be seated in the gallery, and the audio and video feeds to the media center and the theater will be restored. I will then open the court.

TC: This closed Article 39(a) session was classified _____ (*state highest classification level*)."

MJ: This court is in recess.

(CONDUCT OPEN SESSION DRILL)

MJ: This Article 39(a) session is called to order. Let the record reflect that the court is now open. The audio and video feeds to the media center and the theater have been restored. All spectators and media are now seated in the gallery. All parties present in the closed trial session are again present.

TC: This portion of the trial is unclassified.

MJ: Prior to opening this hearing, the Court Security Officer secured, in the courtroom safe, all classified material not in use, and the court security officer has completed the courtroom opening checklist. This checklist will be marked as an Appellate Exhibit.

Close Courtroom Battle Drill

Task: Close the Courtroom to Hear Classified Information

TASK STEPS:

1. TC or DC notify the MJ of their intent to publish classified information.
2. MJ orders the courtroom closed, following the script.
3. The bailiff makes the closure announcement to the gallery.
4. The MPs advise DES inner cordon guards that the courtroom has been closed.
5. The accused's escorts physically clear the courtroom of all unauthorized personnel, as per the MJ's order and badge type.
6. The accused's escorts and MPs post as guards outside the courtroom entrances.
7. The TC support paralegal disengages the audio and video feed cables to the media operations center (MOC) and the theater.
8. The TC support paralegal calls the MOC and the theater to verify they are not receiving any transmission from the courtroom.
9. The CSO verifies that only authorized personnel remain in the courtroom based on security badges and the MJ instructions.
10. The CSO retrieves classified information from courtroom safe, as necessary.
11. The MJ support paralegal assists the court reporter with switching to the classified recording equipment.
12. If digital information is to be displayed, the CSO retrieves the classified laptop from the courtroom safe and the TC support paralegal connects the laptop to applicable system.
13. The CSO completes closed hearing checklist and provides it to the court reporter to be marked as an Appellate Exhibit.
14. The CSO ensures all parties are ready to begin, and then notifies the MJ that his checklist is complete.

Open Courtroom Battle Drill

Task: Open the Courtroom

TASK STEPS:

1. MJ orders the courtroom open, following the script.
2. The court reporter stops recording and switches to the unclassified recording equipment, with the assistance of the MJ support paralegal.
3. If digital information was displayed, the TC support paralegal will disconnect the classified display laptop and hand the laptop to the CSO, who will secure the laptop in the courtroom safe.
4. The court reporter gathers all classified exhibits and hands them to the CSO.
5. The TC and DC gather all classified information in their areas and hands them to either the CSO or their support personnel for proper storage.

(PAUSE UNTIL MJ COMPLETES THE UNCLASSIFIED SUMMARY)

6. The CSO reviews the unclassified summary to verify that it is unclassified.
7. The CSO gathers and secures the MJ's classified material and secures the information in the courtroom safe.
8. The CSO locks the courtroom safe.
9. The CSO inspects the courtroom for classified information.
10. The CSO completes open hearing checklist and provides it to the court reporter to be marked as an Appellate Exhibit.
11. The CSO ensures all parties are ready to begin, and then notifies the MJ that his checklist is complete.
12. MJ directs the CSO to open the courtroom.
13. The TC support paralegal notifies the MOC and the theater the feed will be restored in 5 minutes.
14. The TC support paralegal advises DES personnel that the courtroom has been opened.
15. Escorts post in the courtroom.

16. The TC support paralegal engages the external audio and video feeds.

17. Once the spectators are seated, the TC and DC notify the junior bailiff that all parties and spectators are seated.

18. The junior bailiff notifies the MJ the hearing is ready to be opened.

Closed Hearing Checklist

All spectators have been cleared out of the courtroom.	
All remaining personnel possess a valid security badge.	
Guards are posted outside courtroom entrances.	
Classified recording equipment is in place.	
Audio and video feed to the MOC and the theater are severed.	
The MJ Unclassified Summary is verified unclassified.	

Signed _____ Time _____ Date _____

Open Hearing Checklist

Classified display laptop (if used) is disconnected and secured in the courtroom safe.	
All the court reporter's classified material and the exhibits are secured in the courtroom safe.	
All the TC's classified material is secured in the courtroom safe or with the prosecution team.	
All the DC's classified material is secured in the courtroom safe or with the defense team.	
All the MJ's classified material is secured in the courtroom safe.	
The courtroom safe is locked.	
The courtroom does not contain classified information.	

Signed _____ Time _____ Date _____

Bailiff Script for Closed Sessions

“LADIES AND GENTLEMEN, THE
COURTROOM HAS NOW BEEN CLOSED.
PLEASE RISE AND EXIT THE
COURTROOM THROUGH THE DOUBLE
DOORS BEHIND YOU. SECURITY
PERSONNEL WILL ESCORT YOU TO THE
APPROPRIATE TRAILERS OUTSIDE.
THANK YOU.”

Williams, Patricia CIV JFHQ-NCR/MDW SJA

From: Lind, Denise R COL USARMY (US) [denise.r.lind.mil@mail.mil]
Sent: Monday, March 12, 2012 2:11 PM
To: Williams, Patricia CIV JFHQ-NCR/MDW SJA
Subject: FW: CSO Comment/Recommendation (UNCLASSIFIED)
Signed By: denise.lind@us.army.mil

Classification: UNCLASSIFIED

Caveats: NONE

Tricia,

Pls include this email from Mr. Prather as an AE.

Thank you,
D

Denise R. Lind
COL, JA
Chief Judge, 1st Judicial Circuit

-----Original Message-----

From: Lind, Denise R COL USARMY (US)
Sent: Friday, February 24, 2012 10:34 AM
To: 'Prather, Jay R Mr CIV USA OSA'
Subject: RE: CSO Comment/Recommendation (UNCLASSIFIED)

Classification: UNCLASSIFIED

Caveats: NONE

Mr. Prather,

Thank you. I will take this under advisement and pass on to counsel for both sides.

D

Denise R. Lind
COL, JA
Chief Judge, 1st Judicial Circuit

-----Original Message-----

From: Prather, Jay R Mr CIV USA OSA [<mailto:jay.r.prather@us.army.mil>]
Sent: Friday, February 24, 2012 9:04 AM
To: Lind, Denise R COL MIL USA OSA
Subject: CSO Comment/Recommendation (UNCLASSIFIED)

Ma'am,

I received an "Un-deliverable" from my Office e-mail.

V/r

Jay R. Prather

-----Original Message-----

From: Prather, Jay R Mr CIV USA DCS G-2
Sent: Friday, February 24, 2012 8:57 AM
To: Lind, Denise R COL MIL USA OTJAG
Subject: CSO Comment/Recommendation (UNCLASSIFIED)

Classification: UNCLASSIFIED
Caveats: NONE

Ma'am,

After a few hours (overnight) to think things over, as the CSO, I feel the need To express comments / recommendations in response to yesterday's arraignment proceedings (motions).

I understand this e-mail/correspondence may become part of court records and will probably Need to be presented to both the Trial and Defense counsel teams.

I hope I have not mis-construed the defense's motion to basically, have the CSO be the Classification Decision authority for the Court. I do not recall the exact verbiage in the motion and understand That the decision on said motion is pending.

Only the Original Classification decision Authority (OCA), the entity who owns the data, can Make the decision as to what is classified or not classified, and if it is classified, declassify that said data.

With that said, My recommendation is as follows:

- 1) The Security personnel assigned, Defense, Trial Counsel or CSO should not be placed into a position To make a Security Classification decision without first consultation with the OCA for that Data. Be it through Direct consultation with the OCA or in-depth review of OCA Classification determinations provided thus far In the case.
- 2) Any Motion, ex parte etc., by either side (Trial Counsel, Defense) should have an OCA review/determination Prior to submission to the Court. This will prevent any potential "Leakage" of classified data into an Open Court document, etc. This further protects the Court and yourself as the Judge.
- 3) The Court require a statement/certification to the effect of such review in (2) above be included within the Motion, ex parte etc...This should preclude any potential Perjury or conflict of interest issues. In the case of Defense counsel, I would further recommend that this statement be signed by the Military counsel assigned, I do not think Mr. Coombs, as a Civilian Lawyer, would be able to "Certify" on behalf of the Government.

I am available to discuss further if necessary.

V/r

Jay R. Prather
Senior Program Protection Architect
DAMI-CDS/ARTPC
(703) 325-2523

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Caveats: NONE

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Caveats: NONE

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Caveats: NONE

Classification: UNCLASSIFIED

Caveats: NONE

UNITED STATES OF AMERICA)

v.)

Manning, Bradley E.)
PFC, U.S. Army,)
HHC, U.S. Army Garrison,)
Joint Base Myer-Henderson Hall)
Fort Myer, Virginia 22211)

Prosecution Proposed
Case Calendar
Update

29 February 2012

1. The proposed calendar is based upon several assumptions. To the extent these assumptions prove to be incorrect or too ambitious, the schedule will be correspondingly longer. These assumptions are:

a. The United States and defense file their motions according to the judicial calendar, and there are no continuances.

b. All parties to this court-martial protect classified information and err on the side of caution when creating documentation that could contain classified information.

c. The military judge establishes adequate procedures under Military Rule of Evidence (MRE 505) to adjudicate defense requests and to review potentially discoverable documents.

d. Based on the accused's charged and alleged misconduct, including the alleged compromise of over 700,000 documents which are presumed classified, there are more than ten military commands, national intelligence agencies, and Executive Branch Departments which have equities directly involved to varying degrees, and more than fifty of the same with tangential involvement.

e. Defense requests for classified information do not require inter-agency coordination between multiple Executive Branch Departments, Agencies, and organizations.¹

f. No additional clearances or "read-ons" to any programs will be required based on the United States or defense's use of classified information.

g. All fact witnesses are available for trial and a trial date is set sixty days in advance of the last round of pretrial motions hearings, so that the United States can properly coordinate with senior members of the United States government and all witnesses for both the defense and government. For a contested court-martial, the United States intends to call more than forty witnesses for the trial, many of whom will be offered as expert witnesses.

h. The United States has gathered more than 100,000 documents consisting of more than 3 million pages. The United States has gathered approximately eight terabytes of useable digital information found on approximately twenty-three items of digital media belonging to the

¹ The United States recognizes that the defense is unaware of the approval processes for certain classified information and will make requests based on classified information it deems necessary under MRE 505.

accused, third-party individuals, and the United States, which it intends to offer for admission and use during this court-martial.² The United States also intends to offer for admission more than seventy-five different pieces of documentary evidence. For purposes of this schedule, the United States assumes the defense will not stipulate to evidence admission.

i. The consolidation of issues relating to classified information during pretrial hearings and trial will increase judicial efficiency and minimize potential delay.

j. Although the General Court-Martial Convening Authority recently selected the current panel, panel availability will likely change by 1 June 2012, thus changing the venire.

2. Prosecution Proposed Calendar. The prosecution separated the projected issues into seven phases. These seven phases build upon each other and culminate with all litigation concerning classified information closer to the trial. Most of the classified evidentiary motions are predicated upon decisions on the legal and unclassified evidentiary motions.

a. Phase 1. Immediate Action (21 February 2012 - 16 March 2012)

(1) Proposed Case Calendar

- (A) Original Filing: 21 February 2012
- (B) Secondary Filing: 29 February 2012
- (C) Response: N/A
- (D) Article 39(a): 15-16 March 2012

(2) Defense Motion for Appropriate Relief under MRE 505

- (A) Filing: 17 February 2012
- (B) Response: 8 March 2012
- (C) Article 39(a): 15-16 March 2012

(3) Defense Bill of Particulars

- (A) Filing: 16 February 2012
- (B) Response: 8 March 2012
- (C) Article 39(a): 15-16 March 2012

(4) Defense Motion to Compel Discovery #1

- (A) Filing: 16 February 2012
- (B) Response: 8 March 2012
- (C) Article 39(a): 15-16 March 2012

(5) Defense Motion to Compel Depositions

- (A) Filing: 16 February 2012
- (B) Response: 8 March 2012

² A terabyte of storage space could roughly hold "3.6 million 300 Kilobyte images or maybe about 300 hours of good quality video." *United States v. Salver*, No. S-10-0061, 2011 WL 1466887, slip op. at 1 n.2 (E.D.Cal., Apr. 18, 2011). Additionally, a terabyte is roughly equivalent to the digital version of "1,000 copies of the Encyclopedia Britannica" or one-tenth of the printed collection of the Library of Congress. *Id.*

(C) Article 39(a): 15-16 March 2012

b. Phase 2. Legal Motions, excluding Evidentiary Issues (29 March 2012 - 20 April 2012)

(1) Prosecution Proposed Members Instructions, including elements, for Article 104, Article 134, Specifications 1 through 16, including Lesser Included Offenses.

- (A) Filing: 29 March 2012
- (B) Response: 12 April 2012
- (C) Article 39(a): 19-20 April 2012

(2) Defense Unlawful Command Influence

- (A) Filing: 29 March 2012
- (B) Response: 12 April 2012
- (C) Article 39(a): 19-20 April 2012

(3) Defense Improper Referral

- (A) Filing: 29 March 2012
- (B) Response: 12 April 2012
- (C) Article 39(a): 19-20 April 2012

(4) Defense Dismissal of Charges

- (A) Filing: 29 March 2012
- (B) Response: 12 April 2012
- (C) Article 39(a): 19-20 April 2012

(5) Defense Jurisdictional Defects

- (A) Filing: 29 March 2012
- (B) Response: 12 April 2012
- (C) Article 39(a): 19-20 April 2012

(6) Defense Constitutional Challenges to UCMJ, MREs and RCMs

- (A) Filing: 29 March 2012
- (B) Response: 12 April 2012
- (C) Article 39(a): 19-20 April 2012

(7) Unreasonable Multiplication of Charges

- (A) Filing: 29 March 2012
- (B) Response: 12 April 2012
- (C) Article 39(a): 19-20 April 2012

(8) Updated Proposed Case Calendar

- (A) Filing: 29 March 2012
- (B) Response: N/A
- (C) Article 39(a): 19-20 April 2012

(9) **Reciprocal Discovery Requests**

- (A) Filing: 29 March 2012
- (B) Response: 12 April 2012
- (C) Article 39(a): N/A

(10) **MRE 404(b) Disclosures**

- (A) Filing: 6 April 2012

(11) **Witness Lists Exchanged**

- (A) Filing: 6 April 2012
- (B) Government Response: 13 April 2012

(12) **Production of Compelled Discovery for Defense Motion to Compel Discovery #1**

- (A) Date: 16 April 2012³

c. **Phase 3. Evidentiary Issues *not* Involving Classified Information under MRE 505**
(23 April 2012 - 17 May 2012)

(1) **Compel Discovery #2⁴**

- (A) Filing: 23 April 2012
- (B) Response: 7 May 2012
- (C) Article 39(a): 14-16 May 2012

(2) **Motions *in Limine***

- (A) Filing: 23 April 2012
- (B) Response: 7 May 2012
- (C) Article 39(a): 14-16 May 2012

(3) **Motions to Suppress**

- (A) Filing: 23 April 2012
- (B) Response: 7 May 2012
- (C) Article 39(a): 14-16 May 2012

(4) **Compel Experts**

- (A) Filing: 23 April 2012
- (B) Response: 7 May 2012
- (C) Article 39(a): 14-16 May 2012

(5) **Compel Witnesses**

- (A) Filing: 23 April 2012

³ This date is proposed for unclassified information. If the information is classified, the United States will evaluate whether it should request a continuance, in order to properly determine how many original classification authorities must approve production or an alternative under MRE 505.

⁴ Although the defense has stated they will only file a single motion to compel discovery, the United States anticipates at least one additional motion to compel discovery for unclassified information.

- (B) Response: 7 May 2012
- (C) Article 39(a): 14-16 May 2012

(6) Pre-Admit Evidence

- (A) Filing: 23 April 2012
- (B) Response: 7 May 2012
- (C) Article 39(a): 14-16 May 2012

(7) Pre-Authenticate Evidence

- (A) Filing: 23 April 2012
- (B) Response: 7 May 2012
- (C) Article 39(a): 14-16 May 2012

(8) Pre-Qualify Experts⁵

- (A) Filing: 23 April 2012
- (B) Response: 7 May 2012
- (C) Article 39(a): 14-16 May 2012

(9) Requests for Judicial Notice

- (A) Filing: 23 April 2012
- (B) Response: 7 May 2012
- (C) Article 39(a): 14-16 May 2012

(10) Privileges

- (A) Filing: 23 April 2012
- (B) Response: 7 May 2012
- (C) Article 39(a): 14-16 May 2012

(11) Defense Notice of Intent to Disclose Classified Information under MRE

505(h)(1)

- (A) Filing: 23 April 2012

(12) Defense Notice of Accused's Forum Selection and Notice of Pleas in Writing

- (A) Date: 17 May 2012⁶

⁵ The United States anticipates that a minimum of two days will be required to pre-qualify all experts, which focus on unclassified material.

⁶ If the accused selects a panel, the United States proposes the panel be notified no less than sixty days prior to trial, in order to coordinate for extended special duty and travel.

d. Phase 4. Evidentiary Issues Involving Classified Information under MRE 505 (24 May 2012 - 22 June 2012)⁷

- (1) **Motions *in Limine***
 - (A) Filing: 24 May 2012
 - (B) Response: 7 June 2012
 - (C) Article 39(a): 20-22 June 2012
- (2) **Litigation Concerning MRE 505 Substitutions (including In Camera Review)**
 - (A) Filing: 24 May 2012
 - (B) Response: 7 June 2012
 - (C) Article 39(a): 20-22 June 2012
- (3) **Motions to Suppress**
 - (A) Filing: 24 May 2012
 - (B) Response: 7 June 2012
 - (C) Article 39(a): 20-22 June 2012
- (4) **Compel Experts**
 - (A) Filing: 24 May 2012
 - (B) Response: 7 June 2012
 - (C) Article 39(a): 20-22 June 2012
- (5) **Compel Witnesses**
 - (A) Filing: 24 May 2012
 - (B) Response: 7 June 2012
 - (C) Article 39(a): 20-22 June 2012
- (6) **Pre-Admit Evidence**
 - (A) Filing: 24 May 2012
 - (B) Response: 7 June 2012
 - (C) Article 39(a): 20-22 June 2012
- (7) **Pre-Authenticate Evidence**
 - (A) Filing: 24 May 2012
 - (B) Response: 7 June 2012
 - (C) Article 39(a): 20-22 June 2012
- (8) **Pre-Qualify Experts**
 - (A) Filing: 24 May 2012
 - (B) Response: 7 June 2012
 - (C) Article 39(a): 20-22 June 2012

⁷ This process will likely require the military judge to review classified information within a special facility or under special handling procedures. Additionally, this process will likely take some time for the military judge to make her rulings on all classified information evidentiary motions.

(9) Judicial Review of Discoverable Information

- (A) Filing: 24 May 2012
- (B) Response: 7 June 2012
- (C) Article 39(a): 20-22 June 2012

(10) Production of Compelled Discovery for Defense Motion to Compel Discovery #2

- (A) Date: 14 June 2012⁸

e. Phase 5. Miscellaneous Motions (15 June 2012 - 18 July 2012)⁹

(1) Grunden Hearing for all Classified Information

- (A) Filing: 15 June 2012
- (B) Response: 6 July 2012
- (C) Article 39(a): 16-18 July 2012

(2) Article 13

- (A) Filing: 15 June 2012
- (B) Response: 6 July 2012
- (C) Article 39(a): 16-18 July 2012

(3) Speedy Trial, including Article 10

- (A) Filing: : 15 June 2012
- (B) Response: 6 July 2012
- (C) Article 39(a): 16-18 July 2012

(4) Pre-Qualify Additional Experts

- (A) Filing: : 15 June 2012
- (B) Response: 6 July 2012
- (C) Article 39(a): 16-18 July 2012

(5) Any Additional Motion that does not have an Identified Deadline

- (A) Filing: 15 June 2012
- (B) Response: 6 July 2012
- (C) Article 39(a): 16-18 July 2012

⁸ This date is proposed for unclassified information. If the information is classified, the United States will evaluate whether it should request a continuance, in order to properly determine how many original classification authorities must approve production or an alternative under MRE 505.

⁹ The defense stated during multiple RCM 802 conferences, that they expect the Speedy Trial motion to be very lengthy. The United States expects the Article 13 motion to be very lengthy and potentially require many witnesses to travel from across the United States. The United States proposes one additional week before the responses are due, and this will allow more time to answer the motions while concurrently planning for the Phase 4 motions hearing (20 - 22 June 2012).

f. **Phase 6. Member Selection (23 July 2012 - 30 July 2012)**

(1) **Voir Dire Questions**

- (A) Filing: 23 July 2012
- (B) Response: N/A
- (C) Article 39(a): N/A

(2) **Flyer Due**

- (A) Filing: 23 July 2012

(3) **Questionnaires**

- (A) Filing: 23 July 2012

g. **Phase 7. Trial by Members (30 July 2012 - 17 August 2012)**

- (1) Article 39(a): 30 July 2012
- (2) Voir Dire: 31 July 2012
- (3) Trial: 31 July -3 August 2012, 6- 10 and 13 - 17 August 2012¹⁰



ASHDEN FÉIN
CPT, JA
Trial Counsel

¹⁰ Although all parties, panel members, and witnesses should be available seven days each week, the prosecution recommends scheduling the trial with members for five days per week, to allow the panel members two-days rest so they may better stay focused on their duties and better retain the information.

IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES

v.

MANNING, Bradley E., PFC

U.S. Army, xxx-xx-xx

Headquarters and Headquarters Company, U.S.

Army Garrison, Joint Base Myer-Henderson Hall,

Fort Myer, VA 22211

**DEFENSE PROPOSED CASE
MANAGEMENT ORDER**

DATED: 29 February 2012

1. The Defense submits the following proposed Case Management Order for the Court's consideration:

a. Per a docket request, the Government requested a trial date of 3 April 2012. The Defense requested that the trial begin on 30 April 2012.

b. Given the timeline detailed below and the need to accommodate the Government's request for a delay to respond to the Defense's initial motions, the Defense requests the Court to set trial for **5 June – 22 June 2012**. The Defense does not believe the trial will require the entire scheduled time.

2. Under the Government's proposed case calendar, approximately five months are spent dealing with pretrial motions. Although the case deals with a large volume of classified evidence, five months is an exaggerated time line for the resolution of preliminary issues. Additionally, the Government's proposed trial date is over two years (26 months) from the date of PFC Manning's arrest.

3. In the interest of assisting the Court in resolving timeline disputes, the Defense has adopted the Government's general format for the Case Management Order.

a. Phase 1. Immediate Action (21 February – 16 March 2012)

Issues Addressed	Filing Date	Response Date	Article 39(a)
1) Proposed Case Calendar	14 February 2012 *Secondary Filing on 29 March 2012	8 March 2012 * N/A	15 – 16 March 2012
2) Defense Motion for Appropriate Relief under MRE 505 3) Defense Bill of Particulars 4) Defense Motion to Compel Discovery 5) Defense Motion to Compel	14 February 2012	8 March 2012	15 – 16 March 2012

Issues Addressed	Filing Date	Response Date	Article 39(a)
Depositions ¹			
6) Government Discovery Due Diligence Statement to support Defense Waiver	8 March 2012	N/A	15 – 16 March 2012

b. Phase 2. Discovery Issues (23 March – 20 April 2012)

Issues Addressed	Filing Date	Response Date	Article 39(a)
1) Section III Disclosure	23 March 2012	N/A	19 – 20 April 2012
2) M.R.E. 404(b) Disclosures			
3) Defense M.R.E. 505(h) Notice	30 March 2012	13 April 2012 ²	19 – 20 April 2012
4) Reciprocal Discovery Requests	30 March 2012	13 April 2012	19 – 20 April 2012
5) Government Notice of Intent to Use Expert Witnesses	30 March 2012	N/A	19 – 20 April 2012
6) Defense Request for Expert Assistance	2 April 2012	13 April 2012	N/A
7) Production of Compelled Discovery	2 April 2012 ³	N/A	19 – 20 April 2012 ⁴
8) Member Questionnaire	13 April 2012	N/A	19 – 20 April 2012
9) Witness List Exchange	19 April 2012	26 April 2012 ⁵	N/A

c. Phase 3. Legal Motions, excluding Evidentiary Issues (30 March – 4 May 2012)

Issues Addressed	Filing Date	Response Date	Article 39(a)
1) Proposed Elements and Instructions for Article 92, Article 104, and Article 134 (Specifications 1 through 16)	9 April 2012	23 April 2012	3 – 4 May 2012
2) Proposed Elements and Instructions			

¹ If the Court orders the depositions, the Defense requests that these depositions take place between the 26th and 30th of March.

² If the Government objects to information contained in the Defense notice on classified privilege grounds, not being relevant, or proposes an alternative to the requested Defense information, the Defense will request an in camera review of the relevancy grounds by the Court. The basis for such a review is that the Defense should be treated similarly to the Government when it files for an in camera proceeding under M.R.E. 505(i)(4)(A).

³ The Government shall provide all compelled discovery by **2 April 2012** either to the Defense or to the Court pursuant to Military Rule of Evidence 505(i). If the Government fails to provide the compelled discovery by **2 April 2012**, the Court will consider appropriate sanctions under Military Rule of Evidence 505(i)(4)(E).

⁴ Should the Government wish to contest the disclosure of classified information, it must request an in camera proceeding under M.R.E. 505(i). The Government is required to submit an affidavit *ex parte* to the Court demonstrating a reasonable expectation of damage to national security. From the perspective of the government, the Court must assess whether, in fact the information is properly privileged. This causes the Court to review whether the material is classified information, and if the disclosure would be detrimental to the national security. If the Court makes a finding that the Government meets the requirements with respect to the classified information, an in camera proceeding is held after appropriate notice to the Defense concerning the information at issue.

⁵ The Government must provide notice of any Defense requested witness that it intends to oppose production of at trial.

Issues Addressed	Filing Date	Response Date	Article 39(a)
for Lesser Included Offenses 3) Defense Unlawful Command Influence 4) Defense Improper Referral 5) Jurisdictional Defects 6) Defense Dismissal of Charges 7) Defense Unreasonable Multiplication of Charges 8) Defense Jurisdictional Defects 9) Constitutional Challenges to UCMJ, MREs and RCMs			

d. Phase 4 Evidentiary Issues (16 April – 11 May 2012)

Issues Addressed	Filing Date	Response Date	Article 39(a)
1) Compel Additional Discovery (if applicable) 2) Motions in Limine 3) Motions to Suppress Statements and/or items seized	16 April 2012	30 April 2012	10 – 11 May 2012
4) Government Notice to Defense of In Camera Review Request ⁶	27 April 2012	4 May 2012	10 – 11 May 2012
5) Notice of Accused's Forum selection and Notice of Pleas in writing	10 May 2012	N/A	10 – 11 May 2012

e. Phase 5 Miscellaneous Motions (4 May – 25 May 2012)

Issues Addressed	Filing Date	Response Date	Article 39(a)
1) Grunden Hearing for all Classified Information 2) Article 13 ⁷ 3) Speedy Trial, including Article 10 4) Compel Experts (if necessary) 5) Compel Witnesses (if necessary)	4 May 2012	18 May 2012	24 – 25 May 2012

⁶ If the Court determines an in camera proceeding is appropriate, the Government must provide notice to the Defense. The information within the Government's notice may be described by generic terms as the Court has approved, rather than identifying the classified information. Following the briefing and argument by the parties in the in camera proceeding, the Court determines whether any of the classified information must be disclosed to the Defense. Only classified information that is "relevant and necessary to an element of the offense or a legally cognizable defense and is otherwise admissible" is subject to disclosure. M.R.E. 505(i)(4)(B). The Court must decide this issue from the Defense's point of view.

⁷ The Article 13 motion will have several witnesses. If the Court wishes to handle the motion during the 24 – 25 May 39(a), the Defense recommends starting the 39(a) on the 23rd to allow for the needed time to present witness testimony.

Issues Addressed	Filing Date	Response Date	Article 39(a)
6) Pre-Admit Evidence 7) Pre-Authenticate Evidence 8) Pre-Qualify Experts 9) Requests for Judicial Notice 10) Any additional motion that does not have an identified deadline			
11) Government Request for Alternatives to Full Disclosure under M.R.E. 505(i)(4)(D) (IF necessary)	18 May 2012	N/A	24 – 25 May 2012

f. Phase 6. Member Selection (23 May – 4 June 2012)

Issues Addressed	Filing Date	Response Date	Article 39(a)
1) Voir Dire Questions	23 May 2012	N/A	4 June 2012
2) Court-Martial Flyer	23 May 2012	N/A	4 June 2012

4. The point of contact for this memorandum is the undersigned at (401) 744-3007 or by e-mail at coombs@armycourt martialdefense.com.

Respectfully submitted,



DAVID EDWARD COOMBS
Civilian Defense Counsel

UNITED STATES

 γ

MANNING, Bradley E., PFC

U.S. Army, xxx-xx

Headquarters and Headquarters Company, U.S.

Army Garrison, Joint Base Myer-Henderson Hall,

Fort Myer, VA 22211

**SUPPLEMENT TO THE
DEFENSE MOTION FOR
APPROPRIATE RELIEF UNDER
MILITARY RULE OF
EVIDENCE 505**

DATED: 29 February 2012

1. PFC Bradley E. Manning, by and through counsel, moves this court, pursuant to R.C.M. 906 and Military Rule of Evidence (M.R.E.) 505 to issue a Protective Order under M.R.E. 505(g)(1).

2. As the moving party, the Defense has the burden of persuasion. R.C.M. 905(c)(2). The burden of proof is by a preponderance of the evidence. R.C.M. 905(c)(1).

3. The Defense incorporates those facts referenced in Appellate Exhibit IV.

4. On 24 February 2012, the Defense contacted the Government in an effort to collaborate on the proposed content for the Court Protective Order. The Defense's goal was to clarify the Government's position, and ensure that the parties could agree on the basic issue that needed to be resolved – i.e. who should decide whether a given submission contained classified information. The Defense's position was that the Government should not be in a position where it unilaterally decides whether something that the Defense or the Court submits constitutes spillage. Instead, the Defense submitted that the parties needed to identify a neutral third party, such as the Court Security Officer, to be given this interpretive role. [See Attachment A for entire email exchange].

5. The Government responded to the Defense's email by stating that it was in the process of consulting with various stakeholders and would have a draft protective order for the Defense's review in about a week. The Government expressed confusion over the Defense's use of the word "Government" in its email. In particular, the Government stated, "What is confusing is

your use of the word 'government.' If you mean the prosecution, then we agree. If you mean the United States Government, then we disagree because an OCA, or their delegate, is the ultimate authority on what is classified when it comes to their classified information."

6. The Defense clarified that the use of the word 'government' was intended to be synonymous with 'prosecution.' The Defense then reiterated its position and asked the Government to clarify its basic position on the issue. The Government responded by stating it would be "impossible" to answer the Defense's question without having "a few days to speak with the OCA or their representatives."

7. Frustrated by the Government's failure to state (even in one sentence) its basic position, the Defense clarified that it was really just looking for a "yes" or "no" answer to the following question: "Is it your position that the CSO (and not trial counsel) will work with the OCA to determine if a filing contains classified information?" The Defense informed the Government that it needed an answer to this question so that it could prepare accordingly.

8. The Government again responded that it intended to get the Defense an answer by "the middle to the end of the week" once it spoke with the OCAs or their representatives about the issue.

9. Due to the Government's nonresponsive answer, the Defense reiterated to the Government that it was simply looking for an answer regarding whether the Government envisioned a role for the CSO or not. The Defense informed the Government that if it could not even provide the Defense with the Government's basic position on this critical issue (i.e. who reviews and determines whether a document contains classified information), then it did not seem that the Government was amenable to working together on the issue.

10. The Government responded that it disagreed and believed that the Government and Defense could work together on a solution. However, the Government maintained that it had to "consider all equities involved" and that the "prosecution represents the United States government and its collective interests." The Government stated that before it could commit to a course of action it "MUST figure out the process, who would be involved, and consider all courses of action (as directed by the military judge)." The Government then stated that it was "exploring all the different methods to allow for efficient and safe submissions of documents to the court" and "should have a proposed way forward by the middle to end of this week, which we intend to share with you for comment, in an effort to work together for a final product."

11. The Defense subsequently informed the Government that it believed the Government was unnecessarily making the process more difficult than it needed to be. Because of the Government's continued refusal to answer a basic question, the Defense informed the Government that it would proceed with a separate course of action.

12. The Government replied that it thought it was "unfortunate that within one duty day of our hearing, you [the Defense] have made the decision not to work together on this issue." The Government stated that "although your question seemed simple to you and the defense, the prosecution is not in the position to commit to a course of action without first consulting with

entities that would be required to actually conduct the work that you propose or that COL Lind suggested, such as an OCA representative consulting with the CSO or a CSO equivalent, communicating over a secure network, etc.” The Government then informed the Defense that it would “diligently work this week to develop a proposed plan” and would submit the plan to the Defense for comment prior to submitting it to the Court.

13. The Defense reiterated, yet again, the fact that it was not looking for a commitment by the Government to a course of action, but simply an agreement on the basic issue we were trying to resolve. Additionally, the Defense stated the Government’s process in drafting a protective order and then submitting it in a week for the Defense’s comment did constitute “working together” with the Defense.

14. The Defense believes that the Government’s responses are clearly obstructionist. It is impossible to believe that the Government cannot commit, without input from the OCAs, to: a) identifying what the issue is that needs resolving; and b) stating its basic position on the issue. The Defense was not seeking the Government’s position on the logistics of the process, but merely its starting point for the protective order. If parties are asked to work together to build a vehicle, but one wants to build a car and the other to build a bicycle, it is unlikely that the process will be a productive one. Without knowing whether the Government is building a car or a bicycle, the Defense is at a distinct disadvantage in the process.

WITNESSES/EVIDENCE

15. The Defense requests the following witnesses be produced in support of this motion:
- a. OCA for Specification 3 and 15 of Charge II;
 - b. Mr. Jay Prather, Court Security Officer

LEGAL AUTHORITY AND ARGUMENT

16. The Defense relies upon the legal authority and argument advanced in Appellate Exhibit IV.
17. The Defense seeks the issuance of the revised Protective Order in order to achieve the following basic goals:

- a. To avoid a reoccurrence of the 14 February 2012 claimed “spillage” of classified information;
- b. To propose a process that protects the Defense from the Trial Counsel unilaterally deciding whether a Defense filing contains classified information¹;

¹ The Defense believes that the Trial Counsel has an inherent conflict of interest with regard to whether a Defense submission contains potentially classified information. By calling “spillage” on the Defense, a Trial Counsel could: a) embarrass the Defense by publicly disclosing that the Defense had improperly disclosed classified information (as at the Arraignment); b) threaten to suspend security clearances, as it has in the past; and c) call into question the

c. To propose a process whereby the Defense and the Court are similarly-situated in terms of their respective obligations and protections in the event of an inadvertent spillage;

d. To propose a process that does not add unnecessarily onerous requirements on the parties.

18. This is not the first court-martial to involve classified information. The Court and the parties have dealt with other cases involving classified information. With experience as our guide, there is no reason to create an overly elaborate process for what should be a rather straightforward issue.

19. At the outset, the parties and Court should be entitled to rely upon their respective security experts to determine whether a specific filing contains classified information. It is the job of the identified security experts for each party and the Court to advise on proper classification decisions and to ensure that classified information is properly protected and marked. Once the parties and Court have obtained assurances from their independent experts that a filing does not contain classified information, the following process should control:

a. The Court may immediately submit its filing;

b. The Government may immediately submit its filing pursuant to local rules;

c. The Defense must submit its filing (other than strictly procedural filings) to the Court Security Officer for his concurrence. If the Court Security Officer concurs with the Defense experts that the filing by the Defense does not contain classified information, the Defense submits its filing pursuant to local rules. If notwithstanding the "blessing" of the CSO, the Trial Counsel (in consultation with the OCA) believes a filing by the Defense *or* the Court contains classified information, then this determination will control. If such a determination is made, the Defense or the Court will not be deemed to have intentionally or negligently released classified information.

20. The Defense has drafted a revised proposed Protective Order. *See* Attachment B. The revised Protective Order details appropriate procedures to protect classified information while still ensuring an efficient and effective court-martial process. *See generally*, M.R.E. 505(g)(1). If the Defense motion is opposed by the Government, then the Defense requests oral argument.

professionalism and ethics of the Defense. In short, making the Trial Counsel the arbiter of potential spillage and the giving the Trial Counsel the ability to argue such a spillage was intentional puts too much power in the Trial Counsel's hands. [Note: I have deliberately used the expression "Trial Counsel" rather than "Government" since the Government expressed confusion on this point].

CONCLUSION

21. Based on the above, the Defense requests that the Court issue the attached Protective Order.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'D. Coombs', with a stylized flourish at the end.

DAVID EDWARD COOMBS
Civilian Defense Counsel

-----Original Message-----

From: coombs@armycourtartialdefense.com
[mailto:coombs@armycourtartialdefense.com]

Sent: Monday, February 27, 2012 12:15 AM

To: Fein, Ashden CPT USA JFHQ-NCR/MDW SJA; Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA; Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA

Cc: Matthew kemkes; Paul Bouchard; Joshua Tooman

Subject: RE: Protective Order

Ashden,

Two points of clarification:

1. As you well know, I have not asked you to "commit to a course of action" – I have asked in as many ways as I possibly can whether we even agree on the basic issue.
2. Completing a protective order and then giving it to me for comment does not constitute "working together" on the protective order.

David

David E. Coombs, Esq.

Law Office of David E. Coombs

11 South Angell Street, #317

Providence, RI 02906

Toll Free: 1-800-588-4156

Local: (508) 689-4616

Fax: (508) 689-9282

coombs@armycourtartialdefense.com

www.armycourtartialdefense.com

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----- Original Message -----

Subject: RE: Protective Order

From: "Fein, Ashden CPT USA JFHQ-NCR/MDW SJA"

<Ashden.Fein@jfhqncr.northcom.mil>

Date: Sun, February 26, 2012 10:31 pm

To: <coombs@armycourtartialdefense.com>, "Morrow III, JoDean, CPT USA

JFHQ-NCR/MDW SJA" <JoDean.Morrow@jfhqncr.northcom.mil>, "Overgaard,

Angel M. CPT USA JFHQ-NCR/MDW SJA"

<Angel.Overgaard@jfhqncr.northcom.mil>, "Whyte, Jeffrey H. CPT USA

JFHQ-NCR/MDW SJA" <Jeffrey.Whyte@jfhqncr.northcom.mil>

Cc: "Matthew kemkes" <matthew.kemkes@us.army.mil>, "Paul Bouchard"

<paul.r.bouchard.mil@mail.mil>, "Joshua Tooman"

<joshua.j.tooman.mil@mail.mil>

David,

It is unfortunate that within one duty day of our hearing, you have made the decision not to work together on this issue. Although your question seems simple to you and the defense, the prosecution is not in the position to commit to a course of action without first consulting with the entities that would be required to actually conduct the work that you propose or that COL Lind suggested, such as an OCA representative consulting with the CSO or a CSO equivalent, communicating over a secure network, etc.

All the prosecution has asked for, from the defense, is a few days to consult with the equity holders to determine the most efficient means to protect the information and whether the different proposals are feasible. As always, you are free to proceed with a separate course of action; however the prosecution will diligently work this week to develop a proposed plan and we will submit this plan to you, prior to submitting to the military judge (as she directed), for comment to determine if there is a common plan or at least some processes that both the defense and prosecution agrees with.

v/r
Ashden

-----Original Message-----

From: coombs@armycourtartialdefense.com
[mailto:coombs@armycourtartialdefense.com]

Sent: Sunday, February 26, 2012 9:50 PM

To: Fein, Ashden CPT USA JFHQ-NCR/MDW SJA; Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA; Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA

Cc: Matthew kemkes; Paul Bouchard; Joshua Tooman

Subject: RE: Protective Order

Ashden,

I think that the Government is unnecessarily making the process more difficult than it needs to be. This is something that COL Lind cautioned against doing. Because you continue to refuse to provide any answer to basic questions, I will proceed with a separate course of action.

Best,
David

David E. Coombs, Esq.
Law Office of David E. Coombs
11 South Angell Street, #317
Providence, RI 02906
Toll Free: 1-800-588-4156
Local: (508) 689-4616
Fax: (508) 689-9282
coombs@armycourtartialdefense.com
www.armycourtartialdefense.com

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----- Original Message -----

Subject: RE: Protective Order

From: "Fein, Ashden CPT USA JFHQ-NCR/MDW SJA"

<Ashden.Fein@jfhqncr.northcom.mil>

Date: Sun, February 26, 2012 8:53 pm

To: <combs@armycourtartialdefense.com>, "Morrow III, JoDean, CPT USA

JFHQ-NCR/MDW SJA" <JoDean.Morrow@jfhqncr.northcom.mil>, "Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA"

<Angel.Overgaard@jfhqncr.northcom.mil>, "Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA" <Jeffrey.Whyte@jfhqncr.northcom.mil>

Cc: "Matthew kemkes" <matthew.kemkes@us.army.mil>, "Paul Bouchard"

<paul.r.bouchard.mil@mail.mil>, "Joshua Tooman"

<joshua.j.tooman.mil@mail.mil>

David,

I disagree- I know the prosecution and defense can work out a solution, but the prosecution must consider all equities involved. As you know, the prosecution represents the United States government and its collective interests. Just because we, as prosecutors, might think a proposed course of action is the best way forward, that does not necessarily equate to the most efficient and approved way forward, especially if a course of action requires cooperation and concurrence with organizations outside the direct command and control of the convening authority.

It is very conceivable to envision a role for the CSO to essentially be a classified information clerk for the Court; however before the prosecution, on behalf of the United States government, commits to any course of action, we MUST figure out the process, who would be involved, and consider all courses of action (as directed by the military judge).

As per the military judge's instructions, the prosecution is

exploring all
the different methods to allow for efficient and safe submissions of
documents to the court and how to best have that information managed.
We
should have a proposed way forward by the middle to end of this week,
which
we intend to share with you for comment, in an effort to work
together for a
final product.

v/r
Ashden

-----Original Message-----

From: coombs@armycourtartialdefense.com
[<mailto:coombs@armycourtartialdefense.com>]
Sent: Sunday, February 26, 2012 7:42 PM
To: Fein, Ashden CPT USA JFHQ-NCR/MDW SJA; Morrow III, JoDean, CPT
USA
JFHQ-NCR/MDW SJA; Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA;
Whyte,
Jeffrey H. CPT USA JFHQ-NCR/MDW SJA
Cc: Matthew kemkes; Paul Bouchard; Joshua Tooman
Subject: RE: Protective Order

Ashden,

I'm not sure why you can't answer that question now -- either you
envision a
role for the CSO or you do not. If you can't even give me the
government's
basic position on this critical issue (i.e. who reviews and
determines
whether a document contains classified information), it doesn't
really seem
that you are amenable to working together on this.

David

David E. Coombs, Esq.
Law Office of David E. Coombs
11 South Angell Street, #317
Providence, RI 02906
Toll Free: 1-800-588-4156
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coombs@armycourtartialdefense.com
www.armycourtartialdefense.com
<<http://www.armycourtartialdefense.com/>>;

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contain confidential attorney-client information and is intended for the person(s) or company named. If you are not the intended recipient, please notify the sender and delete all copies. Unauthorized disclosure, copying or use of this information may be unlawful and is prohibited.***

----- Original Message -----

Subject: RE: Protective Order

From: "Fein, Ashden CPT USA JFHQ-NCR/MDW SJA"

<Ashden.Fein@jfhqncr.northcom.mil>

Date: Sun, February 26, 2012 7:28 pm

To: <coombs@armycourt martialdefense.com>, "Morrow III, JoDean, CPT USA

JFHQ-NCR/MDW SJA" <JoDean.Morrow@jfhqncr.northcom.mil>, "Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA"

<Angel.Overgaard@jfhqncr.northcom.mil>, "Whyte, Jeffrey H. CPT USA

JFHQ-NCR/MDW SJA" <Jeffrey.Whyte@jfhqncr.northcom.mil>

Cc: "Matthew kemkes" <matthew.kemkes@us.army.mil>, "Paul Bouchard"

<paul.r.bouchard.mil@mail.mil>, "Joshua Tooman"

<joshua.j.tooman.mil@mail.mil>

David,

Thank you. I intend to get you the answer by the middle to end of the week, once I speak with the OCAs or their representatives about the issue.

v/r

Ashden

-----Original Message-----

From: coombs@armycourt martialdefense.com
[<mailto:coombs@armycourt martialdefense.com>]

Sent: Sunday, February 26, 2012 7:26 PM

To: Fein, Ashden CPT USA JFHQ-NCR/MDW SJA; Morrow III, JoDean, CPT USA

JFHQ-NCR/MDW SJA; Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA; Whyte,

Jeffrey H. CPT USA JFHQ-NCR/MDW SJA

Cc: Matthew kemkes; Paul Bouchard; Joshua Tooman

Subject: RE: Protective Order

Ashden,

I am really just looking for a "yes" or "no" answer to the following question: Is it your position that the CSO (and not trial counsel) will work with the OCA to determine if a filing contains classified information? I

need an answer to this so that I can prepare accordingly. Thanks.

Best,
David

David E. Coombs, Esq.
Law Office of David E. Coombs
11 South Angell Street, #317
Providence, RI 02906
Toll Free: 1-800-588-4156
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----- Original Message -----

Subject: RE: Protective Order
From: "Fein, Ashden CPT USA JFHQ-NCR/MDW SJA"
<Ashden.Fein@jfhqncr.northcom.mil>
Date: Sun, February 26, 2012 7:18 pm
To: <coombs@armycourtartialdefense.com>, "Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA" <JoDean.Morrow@jfhqncr.northcom.mil>, "Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA" <Angel.Overgaard@jfhqncr.northcom.mil>, "Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA" <Jeffrey.Whyte@jfhqncr.northcom.mil>
Cc: "Matthew kemkes" <matthew.kemkes@us.army.mil>, "Paul Bouchard" <paul.r.bouchard.mil@mail.mil>, "Joshua Tooman" <joshua.j.tooman.mil@mail.mil>

David,

I know you asked for an answer by tomorrow, but that will be impossible because we will need a few days to speak with the OCA or their representatives. We ask that you give us until the middle to the end of next week to come up with a proposal, so that we may work together to find a reasonable way forward.

As I stated in my previous email- I absolutely think we can reach an agreement that you will likely be 98% amenable with. Our starting point will be your proposed order and we are going to work from there to find a process that will work with our partner organizations, the command, and everyone's resources.

v/r
Ashden

-----Original Message-----

From: coombs@armycourtartialdefense.com
[mailto:coombs@armycourtartialdefense.com]
Sent: Friday, February 24, 2012 6:30 PM
To: Fein, Ashden CPT USA JFHQ-NCR/MDW SJA; Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA; Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA
Cc: Matthew kemkes; Paul Bouchard; Joshua Tooman
Subject: RE: Protective Order

Ashden,

To clarify what I wrote: I did indeed mean "the prosecution" when I said "government". However, I do not believe that the prosecution should be the one working in conjunction with the OCA to make judgment calls on whether something is classified. If your proposed order continues to maintain the position that the prosecution - in conjunction with the OCAs (or their delegates) - should be the one to determine spillage, then I think we may be at an impasse. Please advise on whether that is your position.

Best,
David

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----- Original Message -----

Subject: RE: Protective Order
From: "Fein, Ashden CPT USA JFHQ-NCR/MDW SJA"
<Ashden.Fein@jfhqncr.northcom.mil>
Date: Fri, February 24, 2012 5:48 pm
To: <coombs@armycourt martialdefense.com>, "Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA" <JoDean.Morrow@jfhqncr.northcom.mil>, "Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA" <Angel.Overgaard@jfhqncr.northcom.mil>, "Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA" <Jeffrey.Whyte@jfhqncr.northcom.mil>
Cc: "Matthew kemkes" <matthew.kemkes@us.army.mil>, "Paul Bouchard" <paul.r.bouchard.mil@mail.mil>, "Joshua Tooman" <joshua.j.tooman.mil@mail.mil>

David,

I absolutely think we can reach an agreement! We met with the Department of Justice Litigation Security Group today to understand how the federal courts administratively process filings and other related matters in cases dealing with classified information.

I am confident that by the middle to end of next week, we will have a draft of an order that you will likely be 98% amenable with. Our starting point will be your proposed order and we are going to work from there to find a process that will work with our partner organizations, the command, and everyone's resources.

However, just to clarify a statement you wrote below-

You wrote: "I do not believe that the government should unilaterally decide

whether something that the defense or the judge submits is in violation of a classification decision." What is confusing is your use of the word "government." If you mean the prosecution, then we agree. If you mean the United States Government, then we disagree because an OCA, or their delegate, is the ultimate authority on what is classified when it comes to their classified information.

Have a good weekend.

v/r

Ashden

-----Original Message-----

From: coombs@armycourtartialdefense.com
[mailto:coombs@armycourtartialdefense.com]

Sent: Friday, February 24, 2012 5:37 PM

To: Fein, Ashden CPT USA JFHQ-NCR/MDW SJA; Morrow III, JoDean, CPT USA

JFHQ-NCR/MDW SJA; Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA; Whyte,

Jeffrey H. CPT USA JFHQ-NCR/MDW SJA

Cc: Matthew kemkes; Paul Bouchard; Joshua Tooman

Subject: Protective Order

Ashden,

I wanted to reach out to you to see if we could come to an agreement on the protective order. It seems to me that the reason for our disconnect is that we can't seem to agree on the basic issue. I understand your position to be that everyone has an obligation to protect classified information, and that it is not the role of the defense (or anyone) to second guess the classification determinations. I agree with you on this. However, my view is that we need to figure out who decides whether something is in violation of the classification decision. In some cases, it is clearly not self-evident whether something violates the OCAs' determination or not.

I do not believe that the government should unilaterally decide whether something that the defense or the judge submits is in violation of a classification decision. Instead, I believe that a neutral third party (such as the Court Security Officer) should be given this interpretive

role. To be clear, the CSO is not reviewing or second-guessing the classification determination, but simply providing his expert opinion whether, given the classification determination, a submission by either the defense or the government runs afoul of the OCA prohibitions. This is exactly what Mr. Prather did with regards to the ex parte submission by the defense.

It would be helpful if you could let me know by Monday whether we can at least agree on what the issue is here - i.e. who should decide whether a given submission reveals classified information in light of existing OCA classification determinations. If we can't even agree on the starting point for this discussion, it may not make sense to pursue this issue jointly.

Best,
David

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IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES)

PROTECTIVE ORDER

v.)

MANNING, Bradley E., PFC)

U.S. Army, xxx-xx-)

Headquarters and Headquarters Company, U.S.)

Army Garrison, Joint Base Myer-Henderson Hall,)

Fort Myer, VA 22211)

DATED: _____

1. This matter comes before the Court upon the motion of the defense for a Protective Order to prevent the unauthorized disclosure or dissemination of classified information and documents in the captioned case. The defense seeks a Protective Order covering documents and information previously made available to the accused in the course of his employment with the United States government, as well as documents and information which have been, or will be, reviewed or made available to the accused or defense counsel in this case.

2. This Court finds that this case will involve classified information, the storage, handling, and control of which requires special security precautions mandated by statute, Executive Order, and regulation, and access to which requires the appropriate security clearances and a "need-to-know."

3. Pursuant to the authority granted by Military Rule of Evidence 505; relevant Executive Orders of the President of the United States; regulations of the Departments of Defense and Army; and in order to protect classified information, it is hereby ORDERED as follows:

a. The procedures set forth in this Protective Order apply to the accused, all counsel of record, all other counsel involved in this case, all court personnel, and all other individuals who receive access to classified information or documents in connection with this case.

b. The provisions of this Protective Order and Military Rule of Evidence 505 will apply to all pretrial, trial, post-trial and appellate matters concerning the above captioned case. If necessary, the procedures may be modified from time-to-time by further order of the Military Judge acting under her supervisory authority to ensure a fair and expeditious trial, while protecting the national security interests of the United States.

c. The following definitions apply to the ORDER:

(1) "Classified information," shall mean:

(A) any document or information which has been classified by any executive branch agency in the interests of national security or pursuant to Executive Order 13562, or its predecessor Orders, as "CONFIDENTIAL," "SECRET," or "TOP SECRET," or additionally controlled as "Sensitive Compartmented Information" (SCI);

(B) any document or information, regardless of its physical form or characteristics, which has been derived from information from the United States government that was classified by the United States pursuant to Executive Order 13562 as "CONFIDENTIAL," "SECRET," or "TOP SECRET," or additionally controlled as "SCI";

(C) verbal classified information known to or retained by the accused or defense counsel;

(D) any information, regardless of place of origin that could reasonably be believed to contain classified information, or that refers to national security or intelligence matters; or

(E) any document or information as to which the accused or defense counsel have been notified orally or in writing that such documents or information contained classified information.

(2) The words "documents" "information" or "associated material" as used in this ORDER include, but are not limited to, all written or printed matter of any kind, formal or informal, including originals, identical copies, and all non-identical copies, whether different from the original by reason of any notation made on such copies or otherwise, including without limitation, papers, correspondence, memoranda, notes, letters, reports, summaries, inter-office and intra-office communications, notations of any sort concerning conversations, meetings, or other communications, and all manner of electronic data processing and storage.

(3) "Access to classified information" means having access to, reviewing, reading, learning, or otherwise coming to know, in any manner, classified information.

(4) "Secure area" means a storage facility designated by the Court Security Officer for the storage, handling, and control of classified information.

(5) The word "or" should be interpreted as including "and," and vice versa; "he" should be interpreted as including "she," and vice versa.

(6) The "defense" refers to and includes the accused, his military and civilian counsel.

d. All classified documents and information contained therein shall remain classified unless they bear clear indication that they have been declassified by the agency or department of government (hereinafter referred to as "originating agency") that originated the document or the information contained therein.

e. Information in the public domain is ordinarily not classified. However, if the defense anticipates seeking the confirmation or denial of whether information in the public domain is classified, by questioning any person who has, or has had, access to classified information, or if a

truthful response to a request or question put forth by the defense counsel about information in the public domain requires an individual to reveal classified information, in any proceeding (including pretrial, trial, and post-trial and appellate proceedings) relating to the above captioned case, then the defense must comply with the notice requirements under M.R.E. 505 and the terms of this ORDER.

f. Any unauthorized disclosure of classified information may constitute a violation of the Uniform Code of Military Justice as well as the criminal laws of the United States. Attorneys who intentionally or knowingly violate this ORDER may be reported to their State Bar Association. In addition, any violation of the terms of this ORDER shall be brought immediately to the attention of this Court and may result in a charge of contempt of court and possible referral for criminal prosecution. Any breach of this ORDER may also result in termination of an individual's access to classified information. This Protective Order is to ensure that those authorized to receive classified information in connection with this case will never divulge that information to anyone not authorized to receive it, without prior written authorization from the originating agency and in conformity with this ORDER.

g. Mr. Jay Prather is appointed as Court Security Officer. Mr. Prather shall function as an officer of the Court.

h. Personnel Security Investigations and Clearances

(1) The Court has been advised that all military trial and defense counsel assigned to this case hold at least a SECRET security clearance and require access to the classified information and documents at issue in this case.

(2) The Court Security Officer will verify that the security clearances of all counsel are in proper order. Once an individual counsel's security clearance is verified, that counsel shall have unfettered access to classified information that is relevant and necessary to prepare for this case, subject to the requirements of this ORDER. Any changes or substitutions of military trial or defense counsel shall be immediately made known to the Court Security Officer and Military Judge. Any new military trial or defense counsel shall be served with a copy of this ORDER and shall be subject to the provisions of this ORDER.

(3) Neither the accused, his civilian defense counsel, Mr. David E. Coombs, any associated counsel or employee of civilian defense counsel, may have access to classified information in connection with this case, unless that person first shall:

(A) execute all forms needed by the government to complete a personnel security investigation and make a determination whether to grant a limited access authorization; and have been granted, a security clearance or Limited Access Authorization by the Department of the Army, as verified by the Court Security Officer. Upon the execution and filing of the Memorandum of Understanding (MOU) at Appendix A, the government, under the supervision of the Court Security Officer, shall expeditiously undertake the required action to ascertain the applicant's eligibility for access to classified information.

(B) sign the sworn statement in the MOU at Appendix A to this ORDER. Any retained civilian defense counsel's MOU shall include a statement expressing his understanding that the failure to abide by the terms of this Protection Order will result in a report to his State Bar Association.

(C) sign a standard form nondisclosure agreement as a condition of access to classified information. Each person executing the MOU at Appendix A must provide an original to the Court Security Officer.

i. Upon compliance with the procedures set forth above, the Court Security Officer shall authorize the following attorney for the defense to be given access to classified documents and all other information as required by the Government's discovery obligations and otherwise as needed to prepare for this case: Mr. David E. Coombs. Any additional person whose assistance the defense reasonably requires, including defense witnesses, may only have access to classified information after first satisfying the requirements described in this ORDER. The Court Security Officer, without the need for prior notice to trial counsel, will verify that the identified individual has the requisite security clearance and a need-to-know. If the identified individual does not have the requisite security clearance and a need-to-know, the Court Security Officer shall direct the individual to execute, through trial counsel, all forms needed by the government to complete a personnel security investigation in order to make a determination whether the individual qualifies for a limited access authorization grant. If such a process is completed, the Court Security Officer shall ensure the individual complies with all other requirements described in this ORDER prior to being granted access to classified information.

j. In addition to the MOU contained in Appendix A, any person who as a result of this case gains access to information contained in any Department of the Army Special Access Program, as the term is defined in Executive Order 13526, or to SCI, or to any information subject to special handling procedures, shall sign any nondisclosure agreement that is specific to that information.

k. All requests for clearances and access to classified information in this case by persons subject to this ORDER or for clearances to a higher level of classification, shall be made to the Court Security Officer, who shall promptly process the requested security clearances.

l. The security procedures contained in this ORDER shall apply to any civilian defense counsel retained by the accused, and to any other persons who may later receive classified information from the government in connection with this case. The substitution, departure, or removal from this case of defense counsel or any other cleared person associated with the defense as an employee or witness or otherwise, shall not release that person from the provisions of this ORDER or the MOU executed in connection with this ORDER.

m. In the event classified information must be presented at trial, the following procedures shall apply:

(1) The defense shall provide notice of intent to elicit classified information at trial to the government and the Court consistent with Military Rule of Evidence (M.R.E.) 505(h) and any

Case Management Order entered by the Court. All associated material and other documents of any kind or description containing any of the information in the defense disclosure notice shall be stored under conditions prescribed by the Court Security Officer.

(2) The notice under M.R.E. 505(h) shall contain a brief but specific written description of any information known or believed to be classified, which the defense reasonably expects to disclose or cause to be disclosed in any pretrial motion, proceeding or at trial.

(3) The defense disclosure notice, if containing classified information, shall be filed under seal with the Court Security Officer, as more particularly set forth below in paragraph n(2).

n. Handling and Protection of Classified Information.

(1) The Court Security Officer shall arrange for and maintain an appropriately approved secure area for the use of classified information and documents related to this case. He shall make prompt arrangements for the storage of such material. The Court is informed that both government and defense counsel have approved receptacles for storing classified information. The Court Security Officer shall verify this fact. If the Court Security Officer determines the receptacles for the government or defense to be insufficient, the Court Security Officer shall establish procedures to assure that proper storage is provided to the government or defense. The Court Security Officer, in consultation with defense counsel, shall establish procedures to ensure that the defense secure area may be maintained and operated in the most efficient manner consistent with the protection of classified information. The Court Security Officer shall not reveal to the government the content of any conversations he may hear among the defense, nor reveal the nature of the documents being reviewed or the work being generated. The presence of the Court Security Officer shall not operate to render inapplicable the attorney-client privilege or the attorney work product doctrine.

(2) All pleadings and other documents filed by the government or defense shall be handled under one of the following procedures:

(A) Classified Information: Any pleading or other document that contains any classified information or that a party believes may contain classified information shall be filed under seal with the Court Security Officer. The parties shall file under seal both the original pleading or document and two copies. Pleadings filed under seal with the Court Security Officer shall be marked, "Filed Under Seal with the Court Security Officer." The time of physical submission to the Court Security Officer shall be considered the date and time of filing. The Court Security Officer shall promptly examine the pleading or document and, if necessary, in consultation with representatives of the original classification authorities, determine whether the pleading or document contains classified information. If the Court Security Officer determines that the pleading or document does not contain classified information, he shall unseal the submission, and alert the filing party to this fact. The filing party shall then submit the pleading or document pursuant to local rules. If the Court Security Officer determines that the pleading or document contains classified information, he shall ensure that the portion of the document containing classified information is marked with the appropriate classification marking and remains under seal. All portions of all papers filed that do not contain classified information

shall be immediately unsealed by the Court Security Officer and filed pursuant to local rules. The original portion of the document containing classified information will be held by the Court Security Officer for insertion in the classified portion of the record of trial. The Court Security Officer shall immediately deliver copies of the entire filed pleading or document to the Court and opposing counsel in accordance with appropriate handling procedures.

(B) Procedural or Administrative Matters: Any pleading or document that is strictly procedural or administrative in nature (e.g., motions for extensions of time, continuances, scheduling matters, etc.) can immediately be filed by the parties pursuant to local rules.

(C) Unclassified Matters: The Government may immediately submit, pursuant to local rules, any filing which it believes is unclassified. Any pleading or document that the defense, in consultation with its detailed security experts, believes to be unclassified shall be electronically sent to the Court Security Officer for his review. The time of electronic submission to the Court Security Officer shall be considered the date and time of filing. The Court Security Officer shall, that same day,¹ examine the pleading or document and, if necessary, in consultation with representatives of the original classification authorities, determine whether the pleading or document contains classified information. If the Court Security Officer determines that the pleading or document does not contain classified information, he shall alert the defense to this fact. The defense shall then promptly submit the pleading or document pursuant to local rules. If the Court Security Officer determines that the pleading or document contains classified information, he shall follow appropriate procedures to correct the inadvertent spillage. The Court Security Officer shall then ensure that the portion of the document containing classified information is marked with the appropriate classification marking and is placed under seal. All portions of all papers filed that do not contain classified information shall be immediately returned to the filing party by the Court Security Officer, so that the party may file the document pursuant to local rules. The original portion of the document containing classified information will be held by the Court Security Officer for insertion in the classified portion of the record of trial. The Court Security Officer shall immediately deliver copies of the entire filed pleading or document to the Court and opposing counsel in accordance with appropriate handling procedures.

(D) Government Non-Concurrence: If the government does not concur with a determination by the Court Security Officer regarding whether a filing by the defense or the Court contains classified information, the government's determination shall control. However, if such a determination is made, the inadvertent spillage of classified information by the defense or the Court shall not be deemed a violation of this ORDER.

(3) The Court Security Officer shall maintain a separate sealed record for classified material and shall maintain an unclassified index of such material. The Court Security Officer shall be responsible for maintaining the secured records for purposes of later proceedings or appeal.

¹ If the pleading or document is filed at the end of the day, the Court Security Officer shall review the pleading or document the next morning.

(4) Classified documents and information, or information believed to be classified, shall only be discussed in an area approved by the Court Security Officer, and in which persons not authorized to possess such information cannot overhear such discussions.

(5) No one may discuss any of the classified information over any standard commercial telephone instrument or any inter-office communication system, or in the presence of any person who is not authorized to possess such information. Requests for secure telephones, fax machines, or other secure communication devices must be submitted to the Court Security Officer for coordination.

(6) All mechanical devices of any kind used in the preparation or transmission of classified information in this case may be used only with the approval of the Court Security Officer and in accordance with instructions he shall issue.

(7) Upon reasonable advance notice to the Court Security Officer, defense counsel shall be given access during normal business hours and at other times on reasonable request, to classified documents which the government is required to make available to defense counsel but elects to keep in its possession. Persons permitted to inspect classified documents by this ORDER may make written notes of the documents and their contents. Notes of any classified portions of these documents, however, shall not be disseminated or disclosed in any manner or in any form to any person not authorized to receive it subject to this ORDER. Such notes will be secured in accordance with the terms of this ORDER. Persons permitted to have access to the documents will be allowed to view their notes within an area designated by the Court Security Officer. No person permitted to inspect classified documents by this ORDER, including defense counsel, shall copy or reproduce any part of said documents or their contents in any manner or form, except as provided by the Court Security Officer, after he has consulted with the Court.

(8) The defense shall not disclose the contents of any classified documents or information to any person not previously approved by Court or the Court Security Officer without first obtaining the permission of Court Security Officer. Prior to obtaining approval, the Court Security Officer shall verify (1) the intended recipient holds the required security clearance; (2) that the intended recipient has signed the MOU in Appendix A; and (3) the intended recipient has a need-to-know.

(9) Documents that do or might contain classified information shall be transcribed, recorded, typed, copied or otherwise prepared only by persons who have received an appropriate approval for access to classified information.

(10) If counsel for the government advises the defense that certain classified information or documents may not be disclosed to the accused, then defense counsel shall not disclose such information or documents to the accused without prior concurrence of counsel for the government or, absent such concurrence, approval of the Court. Counsel for the government shall be given an opportunity to be heard in response to any defense request for disclosure to the accused of classified information.

(11) All classified documents and information to which any person is given access in this case are now and will remain the property of the United States Government. At the conclusion of this case, all classified information provided by the government to the defense shall be returned by the defense upon demand of the Court Security Officer. At the conclusion of trial, any notes, summaries, or other documents prepared by the defense that do or might contain classified information shall be destroyed by the Court Security Officer in the presence of civilian defense counsel or his designated military defense counsel, unless otherwise ordered by the Court.

(12) As the identity of government intelligence employees or the nature of that employee's affiliation with this case may be classified, and as certain security arrangements may be necessary to protect classified information that may be discussed, the defense may not contact any employee of any government intelligence agency without making prior arrangements for such contact with the Court Security Officer. The Court Security Officer shall ensure that all necessary precautions are taken to protect classified information during any such contact between defense and a government intelligence employee. "Government intelligence employees" are employees from the following organizations: Army Counterintelligence; Central Intelligence Agency, Defense Intelligence Agency, Department of Homeland Security Office of Intelligence and Analysis, Department of State, Federal Bureau of Investigation, National Security Agency, Office of the Director of National Intelligence, and Office of the National Counterintelligence Executive.

o. A copy of this ORDER shall issue forthwith to all counsel assigned this case and to civilian defense counsel, with a further order that defense counsel advise the accused of the contents of this ORDER and furnish him a copy.

p. Nothing contained in these procedures shall be construed as a waiver of any right of the accused.

It is so ORDERED, this the ____ day of March 2012.

DENISE R. LIND
COL., JA
Chief Judge, 1st Judicial Circuit

UNITED STATES

 \mathbf{y}_i

MANNING, Bradley E., PFC

U.S. Army, xxx-xx

Headquarters and Headquarters Company, U.S.

Army Garrison, Joint Base Myer-Henderson Hall,
Fort Myer, VA 22211

**PROTECTIVE ORDER
TO: COURT SECURITY
OFFICER**

DATED:

1. This Court has determined it necessary for the Court Security Officer to verify that substantive matters submitted by the Court and defense do not contain classified information, or if they do, to follow appropriate security measures in order to protect classified information.

2. The provisions of this ORDER are not intended to apply to strictly procedural motions or orders by the Court or the defense (e.g., motions for extensions of time, continuances, scheduling matters, etc.).

3. Based upon the Protective Order of this Court, it is hereby ORDERED

- a. The Court Security Officer shall promptly review the contents of Court and defense submissions for the sole purpose of determining whether the submission and any attachments contain classified information. The Court Security Officer will not be making any classification determinations, but simply assessing whether, in light of OCA classification decisions, a given Court or defense submission contains classified information. In the case of defense submissions, the Court Security Officer shall endeavor to review the submission and make his assessment the same day the submission is received.

- b. The Court Security Officer is directed to limit his review to the extent necessary to determine whether any submission and any attachment contains classified information.

- c. The Court Security Officer is directed not to divulge the contents of any *ex parte* submission in this case to any individual, unless so ordered by the Court.

- d. Upon completing his review, the Court Security Officer shall provide a written declaration to the Court or the defense (as applicable) indicating whether a submission is classified or unclassified.

- e. If the Court Security Officer determines that the pleading or document filed by the defense does not contain classified information, he shall immediately alert the defense to this fact. The defense shall then submit the pleading or document pursuant to local rules. If the Court Security

Officer determines that the pleading or document contains classified information, he shall ensure that the portion of the document containing classified information is marked with the appropriate classification marking and is placed under seal. All portions of all papers filed that do not contain classified information shall be returned to the Defense by the Court Security Officer and filed pursuant to local rules. The original portion of the document containing classified information will be held by the Court Security Officer for insertion in the classified portion of the record of trial. The Court Security Officer shall immediately deliver copies of the entire filed pleading or document to the Court and opposing counsel in accordance with appropriate handling procedures.

f. The Court Security Officer shall comply with all requirements stated in the Court's Protective Order.

It is so ORDERED, this the ____ day of March 2012.

DENISE R. LIND
COL, JA
Chief Judge, 1st Judicial Circuit

UNITED STATES)

v.)

MANNING, Bradley E., PFC)

U.S. Army, xxx-xx)

Headquarters and Headquarters Company, U.S.)

Army Garrison, Joint Base Myer-Henderson Hall,)

Fort Myer, VA 22211)

**DEFENSE REPLY TO
GOVERNMENT MOTION
FOR PROTECTIVE ORDER**

DATED: 13 March 2012

RELIEF SOUGHT

1. The Defense requests that the Court deny the Government's proposed Protective Order. The Defense further requests that the Court grant the Defense's proposed Protective Order (with or without the minor amendments referenced herein). See M.R.E. 505(g)(1). Additionally, the Defense requests that Mr. Prather and the relevant OCA be produced as witnesses for the motions argument.

WITNESSES/EVIDENCE

2. Aside from all Motions and attachments already in evidence, the Defense references herein the following additional evidence:

- Attachment A: Government Email to Defense Dated 26 February 2012
- Attachment B: Court Protective Order—*United States v. Diaz*
- Attachment C: Memorandum of 18 September 2010 to Staff Judge Advocate re: "Preliminary Classification Review of the Accused's Mental Impressions—*United States v. PFC Bradley Manning*"

ARGUMENT

3. The Government's proposed Protective Order is not only nonsensical, it is it downright draconian. The Defense maintains that if the Government's Proposed Protective Order is approved, PFC Manning will be denied his right to counsel in contravention of the Sixth Amendment of the United States Constitution. Moreover, the Defense is dumbfounded that CPT Fein would indicate in his 26 February 2012 email to Mr. Coombs that the Government's Protective Order would be something that the Defense would "likely be 98% amenable with." See Attachment A. The Government could not have been more off-the-mark. The Defense maintains that the Government's Protective Order is the equivalent of using dynamite to kill a fly.

4. M.R.E. 505(g)(1) allows a court to make an “appropriate” protective order to guard against “disclosure of classified information.” Here the Government’s requested order is both not “appropriate” within the meaning of M.R.E. 505(g)(1), nor is it designed to guard only “classified” information. It is designed to guard information that is not classified, but that the Government feels should be “treated as classified.” Moreover, the restrictions that the Government would attempt to place on the Defense are far outside of the realm of the measures contemplated under M.R.E. 505(g)(1)(A)-(G).¹

5. At the outset, the Defense would note that its Protective Order does not contain “countless legal and factual errors” as stated by the Government. See Prosecution Response to Defense Motion for Appropriate Relief Under Military Rule of Evidence 505, page 2. Simply because the Government does not like the Defense’s Protective Order does not mean that the Protective Order contains “countless legal and factual errors.” (See discussion, *infra* at C.).

6. The Defense’s Protective Order was adapted from the Protective Order in *United States v. Diaz*, 2009 CCA LEXIS 79 (N-M.C.C.A. Feb. 19, 2009), *aff’d*, 69 M.J. 127 (C.A.A.F. 2010). Indeed, the Protective Order endorsed by the military judge in *Diaz* had been drafted and proposed by the Government in that case (not the Defense). See Attachment B. Thus, the Protective Order the Defense submits should govern this case—one which apparently contains countless factual and legal errors—was very similar to a Protective Order advanced by the Government, and adopted by the Military Judge in *Diaz*. Notably, the *Diaz* court thought that a Protective Order in the nature of what the Defense is currently submitting was appropriate to deal with classified information that was not already available in the public realm. Additionally, the *Diaz* case has been reviewed by both the Navy-Marine Court of Criminal Appeals and the Court of Appeals for the Armed Forces; neither of these courts expressed any concern with the Protective Order in that case.

7. To the extent that there are differences between the *Diaz* Protective Order and the current Defense Protective Order, this was simply designed to deal with the issue of inadvertent spillage. From a review of the Government’s motion, it appears that it too also had access to the *Diaz* Protective Order. If the Government did have access to the *Diaz* Protective Order, this makes its attack regarding the Defense’s “countless” errors particularly disingenuous.

¹ (1) Protective order. If the government agrees to disclose classified information to the accused, the military judge, at the request of the government, shall enter an appropriate protective order to guard against the compromise of the information disclosed to the accused. The terms of any such protective order may include provisions:

- (A) Prohibiting the disclosure of the information except as authorized by the military judge;
- (B) Requiring storage of material in a manner appropriate for the level of classification assigned to the documents to be disclosed;
- (C) Requiring controlled access to the material during normal business hours and at other times upon reasonable notice;
- (D) Requiring appropriate security clearances for persons having a need to examine the information in connection with the preparation of the defense;
- (E) Requiring the maintenance of logs regarding access by all persons authorized by the military judge to have access to the classified information in connection with the preparation of the defense;
- (F) Regulating the making and handling of notes taken from material containing classified information; or
- (G) Requesting the convening authority to authorize the assignment of government security personnel and the provision of government storage facilities.

8. Below, the Defense will separately address the following issues:

- A. Fundamental Problems with the Government's Protective Order
- B. Other Problems with the Government's Protective Order
- C. Addressing the Government's Concerns with the Defense's Protective Order and Associated Motions

In sum the Defense maintains that the Government has lost all perspective on this issue. The case has been ongoing for nearly two years, largely without incident. That the Government views a future *potential* and *internal* "spillage" (or "spillage" by inference) as having the potential to cause "exceptionally grave damage[]" to the national security of the United States"² when it acknowledges that the information is already in the public domain is wholly unreasonable and out of touch with reality. See Government Proposed Protective Order, paragraph 3.q. By this statement, the Defense certainly does not intend to minimize the importance of safeguarding information; however, it approaches the issue with a modicum of common sense in light of the realities of criminal litigation.

A. Fundamental Problems with the Government's Protective Order

9. The Government's Protective Order is far too broad. It treats unclassified information as classified information and requires that the Defense (but not the Government) take onerous steps to safeguard this unclassified information.³ In this respect, the Defense will address:

- i) The Government's creation of a new category of information, "information treated as classified."
- ii) The scope of the definitions of classified information.
- iii) The Government's proposal that all Defense team members work on all non-procedural matters from a classified computer at an appropriate "government facility."
- iv) The Government's procedure for filing documents.
- v) The Government's sanctions for disclosing "classified" information.

10. Information "Treated as" Classified: The Government has invented a new category of information that it believes should be subject to a Protective Order—information that is "treated as classified". The Government has prepared a list on its own, entitled *Judicial Order to Treat Certain Information As Classified Information* ("Supplemental Order"), wherein lists facts, information, or things that it believes should be "treated as classified." See Government Proposed Protective Order, paragraph 3.n.(4). There is no such category of information to be "treated as classified" – information is either classified or it is not. As the Government is so apt

² Under Executive Order 13526, it is only Top Secret information that has the potential to cause exceptionally grave damage to national security. See § 1.2(1). PFC Manning is not even charged with disclosing Top Secret Information. Moreover, the Defense believes that the damage assessments that it has been requesting in discovery for years will reveal that the original alleged disclosures did not cause damage—much less "exceptionally grave damage"—to national security. If this is the case, how can a second disclosure of that same information cause exceptionally grave damage? The Government loses all credibility when it makes such ridiculous assertions.

³ This is ironic given that the Government has, on at least two occasions, inadvertently disclosed classified information itself.

to point out, *only the OCAs* can determine whether something is or is not classified. By adopting the “treated as classified” procedure, the Government has usurped the role of the OCAs by unilaterally deeming certain things to be “off limits” for either the Defense or the Court to mention.

11. If this list were approved in writing by the relevant OCAs as actually *being* classified, the Defense would obviously not reference the information. Presumably this could have been done and submitted to the Court and the Defense as part of this motion.⁴ Tellingly, the Government acknowledges “that the Supplemental Order is *not* a substitute for a classification review by an appropriate Authority.” See Government Proposed Protective Order, paragraph 3.n.(4). If that is the case, why weren’t the items in the Supplemental Order shown to the OCAs and actually determined by the OCAs to be classified, rather than “treated as classified”?

12. The fact the Government chose to put things on its list, but not to get an OCA statement that the material is, in fact, classified should speak volumes. It signals that the information is not actually classified—it is simply information that the Government does not want the Defense to reference. Absent a showing that something is actually classified, the Government does not get to restrain the Defense’s speech in this manner.

13. The Government justifies its “treated as classified” category of information as being a way to “facilitate an efficient filing process that protects classified information.” See Government Proposed Protective Order, paragraph 3.n.(4). The Government’s proposal is anything but efficient, as discussed below. Moreover, the Government is wrong when it says that it is a process for “protect[ing] classified information”—it is instead a process for protecting what the Government thinks should be “off limits” for the Defense.

14. The Government’s position on the “treated as classified” information is also internally incoherent. If the information is on the Government’s list, it is deemed to be classified and it cannot be referenced. If instead, the Court Security Officer sees something in a filing that is not on the list, but he believes is classified, then the Government proposes that the parties go through the process of having the OCA determine whether the information is classified. If the Government envisages a role for the OCAs, why have the OCAs not approved the government-created list?

15. The implication of the Government’s position is that motions and filings which do not actually contain classified information (but simply information that the Government deems should be “treated as classified”) will be shielded from public view. Undoubtedly, this is an ancillary benefit to the Government, who will be protected from public scrutiny in a high-profile case.

⁴ Indeed, at page 1 of its Supplement to Prosecution Motion for a Protective Order, the Government refers to Enclosure 1 as providing just a “small sampling of classified information that might otherwise seem unclassified, but has been determined to be classified by the appropriate OCAs.” The Defense questions why, to the extent that a list of classified items is appropriate, *this list of actually classified items*, is not the appropriate one to be using in the instant case? As long as everything on the list has been determined to be classified by the OCA and evidence is provided to that effect, the Defense would not object to a list.

16. To the extent that the Court would consider creating a category of information that should be “treated as classified” (which the Defense submits the Court should not consider), the Defense requests that it have the ability to challenge certain things on the list by submitting a request to the relevant OCA as to whether the material is actually classified. The Defense objects to relying on the sheer say-so of the Government that something should be “treated as classified.”

17. Definition of “Classified” Information (paragraph 3. c.(1)). The Defense objects to the Government’s definition of “classified” information in paragraph 3.c.(1)(d), (e) and (f) in its proposed Protective Order. The scope of these provisions is alarmingly broad and would deem almost everything to be classified.

18. For instance, paragraph 3.c.(1)(e) of the Government’s proposed Protective Order says that “classified” information is “any information ... that refers or relates to national security or intelligence matters.”⁵ Para. 3.c.(1)(f) is similar in that it covers “any information obtained from any agency, department or other governmental entity ... that refers to national security or intelligence matters.” This could mean that almost every document involved in this case would be classified, as they can all be construed as “referring” or “relating” to national security or intelligence matters.

19. Paragraph 3.c.(1)(d) of the Government’s Protective Order states that “classified” information includes “any document and information, including non-written, aurally [sic.] acquired information, which the accused or defense counsel have been notified orally or in writing that such document or information *may* be classified.” (emphasis added). Notably, the Government does not state that the information is actually classified. Rather, all it would take for the Government to prevent the Defense from mentioning something in a filing (or having to file something under classified procedures) is for the Government to say that “We believe X fact is classified.” If the Government genuinely believes “X fact” to be classified, the appropriate course of action is to determine through the OCA process whether “X fact” is actually classified. Through this provision, the Government is trying to surreptitiously have the ability to play the trump card on whether the Defense is able to reference certain information.

20. Restrictions on Accused’s Constitutional Right to Counsel: Equally troubling (or perhaps even more so) is the Government’s attempt, under the guise of a Protective Order, to deny PFC Manning his right to counsel. In paragraph 3.k. of its Protective Order, the Government advances an incredulous proposition: that Defense counsel shall prepare any and all pleadings or other documents, including substantive communications (i.e. email), in a “government facility.” In short, the Government proposes that the Defense team literally move to a place with an

⁵ The Defense Protective Order also deems classified information to be “any information, regardless of place of origin, that could reasonably be believed to contain classified information, or that refers to national security or intelligence matters.” In retrospect, and in light of the Government’s current motion, the Defense does not believe this to be an appropriate provision for the Protective Order and would ask that the court strike that subsection from the Defense’s Protective Order. Under normal circumstances, that Defense would think that the parties would exercise common sense in interpreting this provision. However, the Defense now believes that the Government will interpret this provision as applying to all documents which reference or refer to national security or intelligence matters, even if they are clearly not classified or believed to be classified.

approved "government facility" (Kansas⁶, Washington D.C. or Maryland) for the next six months while preparing for trial. Every time that Defense counsel would want to jot down notes for a pleading or cross-examination, draft documents, or send the Court or Government an email, it would have to do so from an approved government facility. Such a suggestion is patently outrageous. See also Protective Order, paragraph 3.1.(4) (all documents prepared by the defense that "do or may contain classified information" shall be "prepared only by persons who have received an appropriate approval for access to classified documents and information, and in the government facility on the three provided laptop computers...").

21. Moreover, there is no logical reason why Defense counsel would have to do all substantive work on this case in a government facility, while the Court would not. In other words, it makes no sense to distinguish between the Court and the Defense in this respect. If the Government believes that moving to a place with a government facility for the next six months is how the Defense must proceed, it must also believe that Your Honor must transact all business dealing with this case (other than purely procedural issues) from a secure government facility.

22. If the Defense is required to work only from a government facility, the accused will be denied his right to counsel. Major Kemkes is currently attending ILE training, which would make it physically impossible for him to work from a government facility. That would mean that one of the accused's counsel would not be able to work on this case at least for the next few months.

23. Mr. Coombs lives in Providence, Rhode Island.⁷ He has a family and other professional obligations. Under the Government's proposed plan, Mr. Coombs will be forced to leave his family for the next six months and secure housing and transportation in Maryland, at a significant personal cost to him or his client.⁸ Moreover, every time Mr. Coombs would want to work on the case (which is very often), he would need to physically be in a government facility. If he were to wake up in the middle of the night and want to work on the case, he would need to go to a government facility and work on one of three designated laptops. If the Military Judge were to ask Mr. Coombs to respond to an inquiry on a non-procedural matter (e.g. "what is your position on the *Jones* case?"), Mr. Coombs would have to physically travel to a government facility to respond.⁹ Further, it seems that Mr. Coombs would not be able to use a blackberry or his personal computer to receive email; any email related to this case would only be available if Mr. Coombs physically went to the government facility.

⁶ The Government refers to the Trial Defense Service Office on Fort Leavenworth, KS as being a "government facility" within the meaning of the Protective Order. As the Government knows, PFC Manning was moved to Fort Meade prior to the arraignment in early February and is not scheduled to go back to Kansas. As such, it is unclear why this is listed as a "government facility" as it is not a viable location from which to operate.

⁷ My apologies for the (somewhat obnoxious) reference to myself in the third-person. It seemed to be the clearest way to delineate between the accused's counsel.

⁸ A conservative guess of the expenses that Mr. Coombs would incur is in the range of \$30,000-\$40,000.

⁹ In all likelihood, the government facility that Mr. Coombs would be working from is the trailer on Fort Meade, Maryland. Although TDS offices are also on the list of "government facilities," the Defense does not believe that TDS would allow civilian counsel full and unfettered access to TDS offices to work on a case for six months or longer.

24. This is all in stark contrast with Government counsel. All the Government attorneys in the case could work on unclassified matters on their personal computers and could receive and send emails on their personal computers or handheld devices. They could work on motions in their office or in the comfort of their home, according to their personal schedule. They would be able to respond to emails from the Court, witnesses, and relevant parties instantaneously and with ease. Meanwhile, Mr. Coombs would be figuratively shackled to Fort Meade, Maryland for six or more months, travelling to the "government facility" any time he had any thoughts or wished to send any non-procedural email. This proposal is absolutely ludicrous. No counsel should have to try to defend a client under these draconian restrictions. The Defense would hazard to guess that no court martial proceeding, or any criminal proceeding in the United States, has been tried under these conditions. Not only would this violate the accused's right to counsel in contravention of the Sixth Amendment, it would be an impermissible restriction on the liberty interests of the Defense team.

25. This "solution" offered by the Government would have the obvious effect of dampening the vigor with which the Defense team could mount a defense. It would have the corresponding benefit for the Government of litigating against a weaker opponent. The Defense believes that this was actually the intent of the provision and is genuinely disappointed in the Government, a representative of the United States, for resorting to such tactics.

26. The Defense has, for almost two years, been able to vigorously defend the accused without the need for such unprecedented measures. There has been only one incident of claimed spillage by the Defense—a "spillage" that the Government concedes was only such because the information was classified by inference. The Defense cannot fathom how the Government could, in good faith, advance this restriction as part of its Protective Order to deal with pleadings and filings which are unclassified. The Defense is fully aware of its responsibilities to guard classified information; it does not need to be in virtual lockdown to guard against the possibility that something it *might* say (which it knows not to say) *might* be determined by the Government to constitute unauthorized disclosure by inference.

27. Filings with the Court: The Government's proposal for only the Defense¹⁰ to file every document (other than strictly procedural in nature) under seal—even if it does not contain classified information—is unnecessary. It places an undue burden on the Defense because it requires that the document be filed in person or through secure email, even where it is abundantly clear that the document is not classified.

28. At paragraphs 3.n.(2) and (5) of its Protective Order, the Government seems to contemplate that it will be the Defense security experts who will physically file the relevant motions. It is not clear why it must be the Defense experts who file the motions and not the Defense attorneys (given that, under the Government's proposal, the Defense attorneys will be at Fort Meade). Hard copy delivery would be impossible in most cases, as the Defense security experts are not physically located at Fort Meade, but rather in Washington D.C. And all of these measures are proposed to be in place in order to provide the Court Security Officer with what everyone knows is an unclassified document.

¹⁰ The Government is not placed under the same burden as the Defense to file every document other than "purely administrative motions, such as extensions of time or continuances" under seal. See paragraph 3.o.

29. At paragraph 3.n.(1) of its Protective Order, the Government indicates that all Defense filings must be submitted to the Court Security Officer by midnight on the date of filing. There is also a corresponding provision for the Government at paragraph 3.o. Is the Government suggesting the Court Security Officer stay in his office until after midnight on the dates of Defense and Government filings to order to receive the relevant information (whether by secure email or by hand delivery)? If so, it is impossible to reconcile this requirement with the Government's position that having Mr. Prather testify about his role in a preliminary hearing is too onerous a requirement to place on him. See page 5, Prosecution Response to Defense Motion for Appropriate Relief under Military Rule of Evidence 505.

30. Moreover, the Government's proposal for *ex parte* filings by the Defense at paragraph 3.n.(3) is laughable, as it contemplates the Government examining the potentially classified portion of the *ex parte* filing. The Government notes that if the Court Security Officer determines that the *ex parte* filing may contain classified information, he must inform the Defense and Trial Counsel of that fact. The Defense must then provide a "classified information supplement" and turn that over to the Trial Counsel. Under the Government's proposal, "The trial counsel shall then consult with the appropriate agencies to determine whether the supplement contains classified information." The Defense does not understand how the *ex parte* nature of the filing is maintained if the Government has a role in reviewing the information in conjunction with the OCAs.

31. Violation of the Protective Order: The Government states at paragraph 3.q. of its proposed Protective Order that:

Any unauthorized disclosure or dissemination of classified documents or information may constitute violations of United States criminal laws. In addition, any violation of the terms of this Order shall be immediately brought to the attention of the Court and may result in a charge of contempt of the Court and possible referral for criminal prosecution. Any breach of this Order may also result in the termination of a person's access to classified documents or information and a formal complaint to that person's state bar association.

32. Apparently, the Government believes that by underlying the word may, this is somehow responsive to the Defense's and Court's concerns about being subject to contempt proceedings and disbarment in the event of unauthorized disclosure. The way the Government's Protective Order is drafted, almost everything is deemed to be classified. The potential for the Defense and for the Court to violate the Government's Protective Order is not only real, but likely.

33. The term "may" does not explain any of the following: Who decides whether a Defense or Court disclosure should be reported to bar association? Will the Government prosecute the Defense or Military Judge for disclosing classified information? If so, under what standard? What if the information is not *actually* classified, but simply deemed to be classified (or, in the words of the Government, "treated as classified")? Does disclosing information that is "treated as classified" but not actually classified subject the Defense and the Court to criminal or disciplinary sanction? Is there a distinction between intentional, negligent and accidental

disclosure? Under what circumstances will a violation of the order result in a suspension of security clearances? Who decides whether the Defense's or the Court's security clearances will be revoked?

34. The point is that the Government has not provided any standard—much less a clear standard—to govern the very real concerns of the Defense and the Court. Given the incredibly broad nature of the Protective Order sought by the Government, the Defense is very concerned about inadvertently disclosing “classified” information. Where the Defense is not permitted to reference any actually classified information, information “to be treated as classified” or information “referring” or “relating” to national security or intelligence matters, the Defense will be walking on eggshells for the next six months. The Defense does not wish to risk criminal sanctions and professional disciplinary proceedings because the Government wishes for anything and everything to be deemed classified. The whole purpose of the system put in place by the Defense's motion is to immunize it (and the Court) from criminal and ethical sanctions so long as the appropriate protocols are followed. The Government's Protective Order contains no such limitations.

35. The Government's Protective Order has the Defense wondering whether this is just a bad joke. The Defense cannot fathom how the Government could not see the failings of the system it proposes be in place to safeguard information which, while classified, has been in the public realm for the past two years.

B. Other Problematic Aspects of the Government's Protective Order

36. The Defense would also point to the following (non-exhaustive) list of issues with the Government's Protective Order:

- Under the Government's Protective Order, there is virtually no role for the Defense Security Experts. It seems that the Government envisages the Defense Security Experts as merely facilitating and opining on logistics (e.g. handling, storage). The Government states at paragraph 3.f. that “Detailed defense security experts are not authorized to make independent classification determination, that is, whether information is classified.” As the Defense has repeatedly stated, the Government is missing the boat. The Defense experts would not make an “independent classification determination”—they would simply advise whether the Defense is permitted to say/write something in light of existing OCA determinations. Incidentally, it is ironic that the Government is so opposed to Defense experts making an “independent classification determination” when that is exactly what the Government is doing through the “treat as classified” designation.
- The Government excludes from paragraph 3.i. of its Protective Order one attorney who has been assigned to the Defense, CPT Joshua Tooman.
- The Defense opposes requesting approval of security clearances through the Trial Counsel as suggested at paragraph 3.i of its Protective Order. The Government does not have any incentive to process such requests expeditiously, as demonstrated by prior

history in this case. Instead, the Defense submits that the requests be processed through the Court Security Officer.

- The Government's restrictions with paragraph 3.l.(6) do not account for the Defense speaking with any of the OCAs either by deposition or by other pretrial interview. Additionally, this provision does not address situations where the Defense is interviewing unit witnesses, such as other intelligence analysts from PFC Manning's unit. These witnesses have knowledge of classified and other information that is the subject of this case. Under the Government's Protective Order, the Defense would have to engage in adversarial litigation in order to have equal access to key witnesses.
- The Government's restrictions on the accused's access to classified information in paragraph 3.m. of Protective Order are both unclear and unreasonable. The section indicates that "[i]f it becomes necessary for the accused to review or discuss classified matters, or otherwise meet with defense counsel, then the trial counsel shall coordinate this meeting. The defense counsel shall notify the trial counsel in writing, no less than ten calendar days in advance." It is unclear whether the Government's position is that for *any* meeting ("or otherwise meet with defense counsel"), the Defense counsel must pre-approve this request with the Government 10 days in advance.¹¹ The Defense assumes that this cannot be what the Government intended, as it does not need the Government's permission to visit the accused. As such, it must mean that if classified information is to be discussed, the Government needs 10 days to arrange the meeting. This is an unreasonable requirement. The Defense understands that there may be some logistical concerns with the confinement facility, but the Government does not need a week and a half to coordinate the accused's movement.

C. Addressing the Government's Concerns with the Defense's Protective Order and Associated Motions

37. The Government goes to great lengths to explain why the Defense's Protective Order "contains countless legal and factual errors"/ "clerical errors" and why the Order "violates the spirit of MRE 505(g)(1)." See Prosecution Response to Defense Motion for Appropriate Relief Under Military Rule of Evidence 505, page 2. There are no such errors. In reality, the Government simply does not like the Defense's order because it takes the power away from the Government and places it in the hands of a third party neutral.

38. The Government says that a "major concern" is that the Defense is giving too much to the Court Security Officer to do. "Requiring the CSO to absorb all of these tasks ... may cause future delays, in addition to unnecessarily burden an expert upon whom the parties and the Court rely heavily." See Prosecution Response to Defense Motion for Appropriate Relief Under Military Rule of Evidence 505, page 2. The Government makes much ado about nothing. All

¹¹ It is not clear whether the Government believes that the Defense must disclose the content of the classified information as a precondition to the meeting. This issue has arisen in the past, and the Defense submitted a Memorandum on 18 September 2010 detailing its position. See Attachment C. To the extent that the proposed provision can be read as requiring disclosure of the contents of the classified information, the Defense maintains that *United States v. Schmidt*, 60 M.J. 1 (C.A.A.F.) precludes the Government from requiring such disclosure.

these tasks are not administratively cumbersome. They involve verification of badges/paperwork; being the liaison for any persons who, in future, need security clearances (though there may be no such persons); making sure that Defense requests for equipment are submitted to the relevant entities, etc. In short, the Defense is asking that the Court Security Officer be the intermediary on these issues. That the Government claims these responsibilities are too burdensome for Mr. Prather, while the Defense claims they are not, underscores why Mr. Prather needs to testify as a witness.

39. The Government also quibbles with some semantic issues in the Defense's Protective Order. See Prosecution Response to Defense Motion for Appropriate Relief Under Military Rule of Evidence 505, page 3. In response to the specific items raised by the Government:

- i) The Defense is not clear on why the Government believes that it has "improperly define[d] [the] scope" of the Protective Order.
- ii) The definition of "defense" is not problematic, as other provisions that are more specific refer to "defense experts." However, the Defense is happy to broaden that provision.
- iii) The provision related to 505(h) is unobjectionable; the Government simply thinks it should be contained in a different motion.
- iv) If the Government believes that the term "Government Intelligence Employees" is too narrowly defined, the Defense is happy to amend the list.
- v) The Defense has included restrictions on the accused's access to classified discovery. See Defense Protective Order, paragraph 3.h.(3), 3.n.(10).

40. The minor nature of the Government's complaints shows that the Defense's Protective Order is virtually unobjectionable. This is not surprising given that the Defense has presented a logical, efficient, and common sense way of proceeding in this case (also essentially the same order originally used in the *Diaz* case). Indeed, it was "in light of these concerns"—concerns which the Defense just addressed in the two preceding paragraphs—that the Government asked the Court to deny the Defense's Protective Order. If these are indeed the Government's concerns with the Defense Protective Order, these concerns are very easily addressed.

41. The Government asks that the Court deny the Defense request for the production of the OCA. After a lengthy and repetitive history of the OCA process, the Government argues in one paragraph why the Defense's request should be denied:

In sum, the Defense has failed to articulate why the anticipated testimony of the referenced OCA is "relevant and necessary." The witnesses' anticipated testimony, specifically to "obtain clarification ... regarding the scope of its classification determination on referencing the OCA within court filings and open court" is "not relevant and necessary" but instead simply requested to assist the Defense in safeguarding classified information. (citations omitted, emphasis added).

See Prosecution Response to Defense Motion for Appropriate Relief Under Military Rule of Evidence 505, page 5.

42. The Defense fully "admits" that the OCA is requested to assist the Defense (and the Court) in safeguarding classified information. The Defense is puzzled at why this means that the OCA is not "relevant and necessary." If there is an OCA that could clarify what the Defense (and the Court) can say and cannot say, how is that *not* "relevant and necessary" in a proceeding to determine how to protect information? The Government inexplicably puts a nefarious spin on the Defense requesting guidance on how to safeguard classified information.

43. Ultimately, the goal is to protect classified information. In order to do so, the Defense and Court must know what they can say or write without disclosing classified information. In this case, there is an added complication in that the Government (and apparently the OCA) believes that something can be "classified by inference." Accepting that to be true for the moment, then the Defense and Court must know what combination of otherwise unclassified information amounts to an impermissible disclosure of "classified by inference" information. The OCA can easily provide that guidance, likely in a 15 minute closed session. That way, all parties will know where they stand and there is no need for the "treated as classified" list that the Government has proposed. We will actually be treating as classified that information which *is actually classified*.

CONCLUSION

44. Based on the above, and its prior submissions, the Defense requests that the Court reject the Government's Protective Order in its entirety. It also renews its request for the Court to adopt the Defense's Protective Order as outlined herein.

Respectfully submitted,



DAVID EDWARD COOMBS
Civilian Defense Counsel

ATTACHMENT A

David Coombs

From: Fein, Ashden CPT USA JFHQ-NCR/MDW SJA <Ashden.Fein@jfhqncr.northcom.mil>
Sent: Sunday, February 26, 2012 10:32 PM
To: coombs@armycourt martialdefense.com; Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA; Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA
Cc: Matthew kemkes; Paul Bouchard; Joshua Tooman
Subject: RE: Protective Order

David,

It is unfortunate that within one duty day of our hearing, you have made the decision not to work together on this issue. Although your question seems simple to you and the defense, the prosecution is not in the position to commit to a course of action without first consulting with the entities that would be required to actually conduct the work that you propose or that COL Lind suggested, such as an OCA representative consulting with the CSO or a CSO equivalent, communicating over a secure network, etc.

All the prosecution has asked for, from the defense, is a few days to consult with the equity holders to determine the most efficient means to protect the information and whether the different proposals are feasible. As always, you are free to proceed with a separate course of action; however the prosecution will diligently work this week to develop a proposed plan and we will submit this plan to you, prior to submitting to the military judge (as she directed), for comment to determine if there is a common plan or at least some processes that both the defense and prosecution agrees with.

v/r
Ashden

-----Original Message-----

From: coombs@armycourt martialdefense.com
[mailto:coombs@armycourt martialdefense.com]
Sent: Sunday, February 26, 2012 9:50 PM
To: Fein, Ashden CPT USA JFHQ-NCR/MDW SJA; Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA; Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA
Cc: Matthew kemkes; Paul Bouchard; Joshua Tooman
Subject: RE: Protective Order

Ashden,

I think that the Government is unnecessarily making the process more difficult than it needs to be. This is something that COL Lind cautioned against doing. Because you continue to refuse to provide any answer to basic questions, I will proceed with a separate course of action.

Best,
David

David E. Coombs, Esq.
Law Office of David E. Coombs
11 South Angell Street, #317

ATTACHMENT B

UNCLASSIFIED

DEPARTMENT OF THE NAVY
GENERAL COURT-MARTIAL
NAVY-MARINE CORPS TRIAL JUDICIARY
CENTRAL JUDICIAL CIRCUIT

UNITED STATES

v.

PROTECTIVE ORDER

Matthew M. DIAZ

LCDR, JAGC, USN

1. This matter comes before the Court upon the motion of the Government for a Protective Order to prevent the unauthorized disclosure or dissemination of classified national security information and documents in the captioned case. The Government seeks a Protective Order covering documents and information previously made available to the accused in the course of his employment with the United States Government, as well as documents and information which have been, or will be, reviewed or made available to the accused or defense counsel in this case.

2. This Court finds that this case will involve classified national security information, the storage, handling, and control of which requires special security precautions mandated by statute, Executive Order, and regulation, and access to which requires the appropriate security clearances and a "need-to-know."

3. Pursuant to the authority granted by Military Rule of Evidence 505; relevant Executive Orders of the President of the United States; regulations of the Departments of Defense and Navy; the general supervisory authority of the Military Judge; and in order to protect the national security of the United States, it is hereby ORDERED as follows:

a. The procedures set forth in this Protective Order apply to the accused, all counsel of record, all other counsel involved in this case, all court personnel, and all other individuals who receive access to classified national security information or documents in connection with this case.

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UNCLASSIFIED

b. The provisions of this Protective Order and Mil. R. Evid. 505 will apply to all pretrial, trial, post-trial and appellate matters concerning the above captioned case. If necessary, the procedures may be modified from time-to-time by further order of the Military Judge acting under his supervisory authority to ensure a fair and expeditious trial, while protecting the national security interests of the United States.

c. The following definitions apply to this ORDER:

1. "Classified information," and "national security information" shall mean:

A. any document or information which has been classified by any executive branch agency in the interests of national security or pursuant to Executive Order 12958, as amended by Executive Order 13292, or its predecessor Orders as "CONFIDENTIAL," "SECRET," or "TOP SECRET," or additionally controlled as "Sensitive Compartmented Information" (SCI);

B. any document or information, regardless of its physical form or characteristics, now or formerly in the possession of a private party which has been derived from information from the United States government that was classified by the United States pursuant to Executive Order 13292 as "CONFIDENTIAL," "SECRET," or "TOP SECRET," or additionally controlled as "SCI";

C. verbal classified information known to or retained by the accused or defense counsel;

D. any information, regardless of place of origin and including "foreign government information," as that term is defined in Executive Order 12958, as amended by Executive Order 13292, or its predecessor Orders that could reasonably be believed to contain classified information, or that refers to national security or intelligence matters; or

E. any document or information as to which the accused or defense counsel have been notified orally or in writing that such documents or information contain classified information.

2. The words "documents" "information" or "associated material" as used in this ORDER include, but are not limited to, all written or printed matter of any kind, formal or informal, including originals, identical copies, and all non-identical

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copies, whether different from the original by reason of any notation made on such copies or otherwise, including without limitation, papers, correspondence, memoranda, notes, letters, telegrams, reports, summaries, inter-office and intra-office communications, notations of any sort concerning conversations, meetings, or other communications, bulletins, teletypes, telefax, invoices, worksheets, and all drafts, alterations, modifications, changes and amendments of any kind to the foregoing, graphic or oral records or representations of any kind, including, without limitation, photographs, charts, graphs, microfiche, microfilm, video tapes, sound recordings of any kind, and motion pictures, electronic, mechanical or electric records or representations of any kind, including, without limitation, tapes, cassettes, discs, CD-ROM, recording, films, typewriter ribbons, computer, or word processor drives, discs, or tapes, and all manner of electronic data processing and storage.

3. "Access to classified information" means having access to, reviewing, reading, learning, or otherwise coming to know, in any manner, classified information.

4. "Secure area" means a storage facility designated by the Security Officer for the storage, handling, and control of classified information.

5. The word "or" should be interpreted as including "and," and vice versa; "he" should be interpreted as including "she," and vice versa.

6. The "defense" refers to and includes the accused, his military and civilian counsel.

d. All classified documents and information contained therein shall remain classified unless they bear clear indication that they have been declassified by the agency or department of government (hereinafter referred to as "originating agency") that originated the document or the information contained therein.

e. Information in the public domain is ordinarily not classified. However, if the defense anticipates seeking the confirmation or denial of whether information in the public domain is classified, by questioning any person who has, or has had, access to classified information, or if a truthful response to a request or question put forth by the defense counsel about information in the public domain requires an individual to

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reveal classified information, in any proceeding (including pre-trial, trial, and post-trial and appellate proceedings) relating to the above captioned case, then the defense must comply with the notice requirements under Mil. R. Evid. 505 and the terms of this ORDER.

f. Any unauthorized disclosure of classified information may constitute violations of the Uniform Code of Military Justice as well as the criminal laws of the United States, including but not limited to, the provisions of Sections 641, 793, 794, 798, 952, and 1924, Title 18, United States Code, and Sections 421 and 783(b), Title 50, United States Code. Attorneys who violate this ORDER may be reported to their State Bar Association. In addition, any violation of the terms of this ORDER shall be brought immediately to the attention of this Court and may result in a charge of contempt of court and possible referral for criminal prosecution. Any breach of this ORDER may also result in termination of an individual's access to classified information. Persons subject to this ORDER are advised that direct or indirect unauthorized disclosure, retention, or negligent handling of classified documents or information could cause serious damage, and in some cases, exceptionally grave damage to the national security of the United States, or may be used to the advantage of a foreign nation against the interests of the United States. This Protective Order is to ensure that those authorized to receive classified information in connection with this case will never divulge that information to anyone not authorized to receive it, without prior written authorization from the originating agency and in conformity with this ORDER.

g. Lieutenant Maurice Hunt, U.S. Navy, Naval Station Norfolk, is appointed as Court Security Officer. LT Hunt shall function as an officer of the Court.

h. Personnel Security Investigations and Clearances

1. The Court has been advised that the following military trial and defense counsel hold a SECRET security clearance and require access to the classified information and documents at issue in this case:

- CDR Rex Guinn, JAGC, USN, Trial Counsel
- LT James Hoffman, JAGC, USN, Trial Counsel
- LCDR Karen Somers, JAGC, USN, Detailed Defense Counsel
- LT Justin Henderson, JAGC, USN, Assistant Defense Counsel

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2. The Security Managers of Region Legal Service Office Mid-Atlantic and Navy Legal Service Office Mid-Atlantic shall without delay verify to the Court Security Officer that the security clearances of the above-named counsel are in proper order, and are directed to assist those counsel that do not have the requisite security clearances in obtaining such clearances. Once a military counsel's security clearance is verified, that counsel shall have unfettered access to classified information that is relevant and necessary to prepare for this case, subject to the requirements of this ORDER. Any changes or substitutions of military trial or defense counsel shall be immediately made known to the Court Security Officer and Military Judge. Any new military trial or defense counsel shall be served with a copy of this ORDER and shall be subject to the provisions of this ORDER.

3. Neither the accused, his civilian defense counsel, Mr. Victor Kelley, any associated counsel or employee of civilian defense counsel, may have access to classified information in connection with this case, unless that person first shall:

a) execute all forms needed by the government to complete a personnel security investigation and make a determination whether to grant a limited access authorization; and have been granted, a security clearance or Limited Access Authorization by the Department of the Navy, through the Court Security Officer. Upon the execution and filing of the MOU at Appendix A, the government shall expeditiously undertake the required action to ascertain the applicant's eligibility for access to classified information.

b) sign the sworn statement in the Memorandum of Understanding (MOU) at Appendix A to this ORDER. Any retained civilian defense counsel's MOU shall include a statement expressing his understanding that the failure to abide by the terms of this Protective Order will result in a report to his State Bar Association.

c) sign a standard form nondisclosure agreement as a condition of access to classified information. Each person executing the MOU at Appendix A must provide an original to the Court Security Officer and a copy to the Trial Counsel and Convening Authority.

i. Upon compliance with the procedures set forth above, the following attorney for the defense shall be given access to classified documents and all other information as required by

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the government's discovery obligations and otherwise as needed to prepare for proceeding in this case: Mr. Victor Kelley. Any additional person whose assistance the defense reasonably requires, including defense witnesses, may only have access to classified information in this case after first obtaining from this Court, with prior notice to the government, an approval for access to the required level of classification on a need-to-know basis, and after satisfying the other requirements described in this ORDER for access to classified information.

j. In addition to the Memorandum of Understanding contained in Appendix A, any person who as a result of this case gains access to information contained in any Department of the Navy Special Access Program, as that term is defined in Executive Order 12958, or to Sensitive Compartmented Information (SCI), or to an information subject to Special Category (SPECAT) handling procedures, shall sign any nondisclosure agreement that is specific to that Special Access Program or to that Sensitive Compartmented Information or SPECAT information.

k. All requests for clearances and access to classified information in this case by persons not named in this ORDER or for clearances to a higher level of classification, shall be made to the Court Security Officer, who, after notifying trial counsel for the government, shall promptly process the requested security clearances. If trial counsel for the government objects to such requests for access or for clearances to a higher level of classification, the matter shall be brought to the attention of the Court for resolution.

l. The security procedures contained in this ORDER shall apply to any civilian defense counsel retained by the accused, and to any other persons who may later receive classified information from the U.S. Department of the Navy in connection with this case. The substitution, departure, or removal from this case of defense counsel or any other cleared person associated with the defense as an employee or witness or otherwise, shall not release that person from the provisions of this ORDER or the MOU executed in connection with this ORDER.

m. In the event classified information must be presented at trial, the following procedures shall apply:

1. The defense shall provide notice of intent to elicit classified information at trial to Trial Counsel and the Military Judge consistent with Military Rule of Evidence 505(h) and any Case Management Order entered. All associated material

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and other documents of any kind or description containing any of the information in the defense disclosure notice shall be stored under conditions prescribed by the Court Security Officer.

2. The notice under Mil. R. Evid. 505 shall contain a brief but specific written description of any information known or believed to be classified, which the defense reasonably expects to disclose or cause to be disclosed in any pretrial motion, proceeding, or at trial.

3. The defense disclosure notice shall be filed under seal with the Court Security Officer, as more particularly set forth below in paragraph n.2.

n. Handling and Protection of Classified Information.

1. The Court Security Officer shall arrange for and maintain an appropriately approved secure area for the use of classified information and documents related to this case. He shall make prompt arrangements for the storage of such material. The Court is informed that both trial and defense counsel have approved receptacles for storing classified information. If these receptacles are determined by the Court Security Officer to be insufficient, the Court Security Officer shall establish procedures to assure that proper storage is provided and that the secure area is accessible to defense counsel during business hours and at other times upon reasonable request as approved by the Court Security Officer. The Court Security Officer, in consultation with defense counsel, shall establish procedures to assure that the secure area may be maintained and operated in the most efficient manner consistent with the protection of classified information. The Court Security Officer shall not reveal to the government the content of any conversations he may hear among the defense, nor reveal the nature of the documents being reviewed or the work being generated. The presence of the Court Security Officer shall not operate to render inapplicable the attorney-client privilege or the attorney work product doctrine.

2. All pleadings and other documents filed by the defense shall be filed under seal with the Court Security Officer. Defense shall file under seal both the original pleading or document and two copies. The Court Security Officer may grant permission, specific to a particular, non-substantive pleading or document (e.g., motions for extensions of time, continuances, scheduling matters, etc.) not containing information that is or might be classified or under seal, to

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file the pleading or document not under seal. Pleadings filed under seal with the Court Security Officer shall be marked, "Filed Under Seal with the Court Security Officer." The time of physical submission to the Court Security Officer shall be considered the date and time of filing. The Court Security Officer shall promptly examine the pleading or document and, in consultation with representatives of the original classification authorities, determine whether the pleading or document contains classified information. If the Court Security Officer determines that the pleading or document contains classified information, he shall ensure that the portion of the document containing classified information is marked with the appropriate classification marking and remains under seal. All portions of all papers filed that do not contain classified information shall be immediately unsealed by the Court Security Officer and filed pursuant to local rules. The original portion of the document containing classified information will be held by the Court Security Officer for insertion in the classified portion of the record of trial. The Court Security Officer shall immediately deliver copies of the entire filed pleading or document to the Court and opposing counsel.

3. Any pleading or other document filed by the government containing classified information shall be filed under seal with the Court Security Officer. Pleadings filed under seal with the Court Security Officer shall be marked, "Filed Under Seal with the Court Security Officer." The time of physical submission to the Court Security Officer shall be considered the date and time of filing. A copy of any such pleading or document shall be immediately provided to the Court and to opposing counsel.

4. The Court Security Officer shall maintain a separate sealed record for classified material and shall maintain an unclassified index of such material. The Court Security Officer shall be responsible for maintaining the secured records for purposes of later proceedings or appeal.

5. Classified national security documents and information, or information believed to be classified, shall only be discussed in an area approved by the Court Security Officer, and in which persons not authorized to possess such information cannot overhear such discussions.

6. No one may discuss any of the classified information over any standard commercial telephone instrument or any inter-office communication system, or in the presence of any

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person who is not authorized to possess such information. Requests for secure telephones, fax machines, or other secure communication devices must be submitted to the Court Security Officer for coordination.

7. All mechanical devices of any kind used in the preparation or transmission of classified information in this case may be used only with the approval of the Court Security Officer and in accordance with instructions he shall issue.

8. Upon reasonable advance notice to the Court Security Officer, defense counsel shall be given access during normal business hours and at other times on reasonable request, to classified national security documents which the government is required to make available to defense counsel but elects to keep in its possession. Persons permitted to inspect classified national security documents by this ORDER may make written notes of the documents and their contents. Notes of any classified portions of these documents, however, shall not be disseminated or disclosed in any manner or in any form to any person not authorized to receive it subject to this ORDER. Such notes will be secured in accordance with the terms of this ORDER. Persons permitted to have access to the documents will be allowed to view their notes within an area designated by the Court Security Officer. No person permitted to inspect classified national security documents by this ORDER, including defense counsel, shall copy or reproduce any part of said documents or their contents in any manner or form, except as provided by the Court Security Officer, after he has consulted with the Court.

9. The defense shall not disclose the contents of any classified documents or information to any person not named in this Protective Order without first obtaining the permission of the Court, following verification by the Court Security Officer of (1) the intended recipient holds the required security clearance; (2) that the intended recipient has signed the MOU in Appendix A; and (3) the intended recipient has a need-to-know. Defense counsel will provide notice to trial counsel of individuals it wants to have view classified material associated with the case. Counsel for the government shall be given an opportunity to be heard in response to any defense request for disclosure of classified information or documents to a person not named in this ORDER.

10. Documents that do or might contain classified information shall be transcribed, recorded, typed, duplicated, copied or otherwise prepared only by persons who have received

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an appropriate approval for access to classified information.

11. If counsel for the government advises defense counsel that certain classified information or documents may not be disclosed to the accused, then defense counsel shall not disclose such information or documents to the accused without prior concurrence of counsel for the government or, absent such concurrence, approval of the Court. Counsel for the government shall be given an opportunity to be heard in response to any defense request for disclosure to the accused of such classified information.

12. All classified documents and information to which any person is given access in this case are now and will forever remain the property of the United States Government. At the conclusion of this case, all classified information provided by the government to the defense shall be returned by the defense upon demand of the Court Security Officer. At the conclusion of trial, any notes, summaries, or other documents prepared by the defense that do or might contain classified information shall be destroyed by the Court Security Officer in the presence of civilian defense counsel or his designated military defense counsel, unless otherwise ordered by the Court.

13. As the identity of government intelligence employees may be classified, and as certain security arrangements may be necessary to protect classified information that may be discussed, the defense may not contact any employee of any government intelligence agency without making prior arrangements for such contact with an attorney for the government, unless the defense files a motion with the Court to authorize such contact, gives the government notice of such motion without revealing the name of the employee the defense seeks to contact, and obtains a court order authorizing that contact. Further, the defense shall give prior notice to government attorneys of any contacts it intends to make with any employee of any government intelligence agency for any reason, including for the purpose of declassifying any classified information relating to this case. "Government intelligence employees" are employees from the following organizations: Central Intelligence Agency, Defense Intelligence Agency, Department of Homeland Security, Department of State, Federal Bureau of Investigation, National Security Agency, and Navy Intelligence.

o. A copy of this ORDER shall issue forthwith to defense counsel named herein, with a further order that said defense

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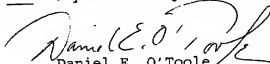
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counsel advise the accused of the contents of this ORDER and furnish him a copy.

p. Nothing contained in these procedures shall be construed as a waiver of any right of the accused.

It is so ORDERED, this the 11th day of January 2007.



Daniel E. O'Toole
Captain, JAG Corps, U.S. Navy
Circuit Military Judge

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APPENDIX A
MEMORANDUM OF UNDERSTANDING

1. I, _____, understand that I may be the recipient of information and intelligence that concerns the present and future security of the United States and that belongs to the United States. This information and intelligence, together with the methods of collecting and handling it, are classified according to security standards set by the U.S. Government. I have read and understand the provisions of the espionage laws (sections 793, 794, and 798 of Title 18, United States Code) concerning the disclosure of information relating to the national defense and the provisions of the Intelligence Identities Protection Act (section 421 of Title 50, United States Code) and I am familiar with the penalties for the violation thereof. I have also read and understand the provisions of SECNAV Instruction 5510.36, dated 17 March 1999, including Changes 1 and 2, concerning safeguarding, disseminating, transmitting and transporting, storage and destruction, and loss or compromise of classified information.

2. I agree that I will never divulge, publish or reveal, either by word, conduct or any other means, such information or intelligence unless specifically authorized in writing to do so by an authorized representative of the U.S. Government or as ordered by the Convening Authority. I further agree to submit for prepublication review any article, speech or other publication derived from, or based upon experience or information gained in the case of United States v. LCDR Matthew M. Diaz, JAGC, USN. I understand this review is solely to ensure that no classified national security information is contained therein.

3. I understand that this agreement will remain binding on me after the conclusion of proceedings in United States v. LCDR Matthew M. Diaz, JAGC, USN.

4. I have received, read and understand the Protective Order entered by the Military Judge on _____, in the case of United States v. LCDR Matthew M. Diaz, JAGC, USN, relating to classified information, and I agree to comply with the provisions thereof.

5. I understand that noncompliance with this Order will be reported to my command, and, if applicable, to my State Bar Association.

Signature

Date

Witnessed, sworn and subscribed to before me this ____ day of _____, 2006.

Signature

Date

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ATTACHMENT C

18 September 2010

MEMORANDUM THRU Staff Judge Advocate, Office of the Staff Judge Advocate, US Army Military District of Washington, Fort Lesley J. McNair, Washington D.C. 30219

FOR Commander, US Army Garrison, Joint Base Myer-Henderson Hall, Fort Myer, Virginia 22211

SUBJECT: Preliminary Classification Review of the Accused's Mental Impressions – *United States v. PFC Bradley Manning*

1. The defense believes that your order, dated 17 September 2010, directing PFC Manning to disclose the classified information that he wishes to discuss with his defense counsel and the Rules for Court-Martial (R.C.M.) 706 board to Mr. Charles Ganiel prior to disclosing this information to his civilian and military defense counsel is not a lawful order and in contravention of the holding of the Court of Appeals for the Armed Forces (C.A.A.F.) in *United States v. Schmidt*, 60 M.J. 1 (C.A.A.F. 2004). The order attempts to circumvent the important role of the attorney-client relationship in maintaining the fairness and integrity of the military justice system. As such, it is a violation of PFC Manning's rights under the Sixth Amendment and Article 27 of the Uniform Code of Military Justice to the effective assistance of counsel in preparing a defense. *Schmidt*, at 2, citing *United States v. King*, 53 M.J. 425 (C.A.A.F. 2000).

2. In *Schmidt*, the appellant was charged with dereliction of duty for failing to exercise appropriate flight discipline and failing to comply with rules of engagement and special instructions in an air-to-ground bombing incident that caused the deaths of several Canadian soldiers in Afghanistan. The appellant was privy to classified information pertaining to his case. The military judge ruled, and the Air Force Court of Criminal Appeals (A.F.C.C.A.) affirmed, that the appellant could not discuss the classified aspects of his case with his civilian defense counsel (who eventually obtained an interim security clearance) without submitting a request through the trial counsel. The C.A.A.F. vacated the A.F.C.C.A. opinion and reversed the ruling of the military judge, holding that Military Rule of Evidence (M.R.E.) 505 "does not require an accused, without benefit of his own counsel, to engage in adversarial litigation with opposing counsel as a precondition to discussing with defense counsel potentially relevant information" that is already in the appellant's knowledge or possession. *Schmidt*, 60 M.J. at 2. As such, the government cannot create a "classified information wall" between the accused and his defense counsel as a precondition to the client being able to speak to his civilian and military defense counsel. *Id.*

3. The defense is well aware of its obligations to safeguard classified information under Army Regulation 380-5 and 18 U.S.C. §§ 793, 794, and 798 and 50 U.S.C. § 421. Based upon this knowledge, on 30 August 2010, the defense voluntarily returned classified information that was given to it by the government without legal authority or proper authorization. See Attachment A. Likewise, on 25 August 2010, the defense alerted the government to the concern of classified information being divulged during the R.C.M. 706 process. As such, the defense renews its request that each defense counsel receive at least Top Secret – Sensitive Compartmented

Information (TS-SCI) clearance. The defense team is currently comprised of the following counsel: Mr. David Coombs (MAJ(P) in the United States Army Reserves); MAJ Matthew J. Kemkes; and CPT Paul R. Bouchard.

4. Additionally, the defense renews its request for limited authorization for PFC Manning's access to classified information. It is likely that PFC Manning's access has been suspended due to the preferred charges. It is anticipated that the defense will need to discuss and share access to the classified information at issue in this case with our client. Therefore, the defense requests authorization for limited access to classified information by the accused in accordance with M.R.E. 505(d)(4).

5. In order to comply with the preparation and filing of M.R.E. 505(h) notice, the defense requests that the protective order dated 17 September 2010 be amended to reflect the following additional guidance:

a. The accused and defense counsel shall prepare forthwith, but in no event later than ____ business days before any R.C.M. 706 Board, Article 32 Investigation, or court hearing, a brief written description of any information known or believed to be classified, which the accused reasonably expects to disclose or cause to be disclosed in any pre-trial motion or proceeding, or at trial of this case, hereinafter referred to as "the Accused's Disclosure Notice"), as required under Military Rule of Evidence 505(h).

b. For purposes of preparing the Accused's Disclosure Notice, defense counsel, subject to compliance with the applicable provisions of this Order, shall be allowed to discuss, communicate and receive information from the accused concerning any matter believed by the accused to contain, involve or relate to classified information, and believed by the accused to relate to this case. Any retained civilian defense counsel shall also comply with the provisions of this Order before having access to said classified information.

c. The accused, through counsel, shall advise the Convening Authority and the trial counsel when he has prepared or possesses the Accused's Disclosure Notice or any other material which the accused or counsel believes contains classified information, which he intends to offer at any R.C.M. 706 Board, the Article 32 Investigation, file in court or use in court, and shall then deliver to the Court Security officer directly, or by means of a courier designated by the Court Security Officer, the Accused's Disclosure Notice and all copies thereof, or any other pleadings. All Associated materials and other documents of any kind or description containing any of the information in the Accused's Disclosure Notice shall be stored under conditions prescribed by the Court Security Officer.

d. Until further Order of the Convening Authority or the Court, the Accused Disclosure Notice and all other written pleadings shall be delivered to the Court Security Officer. The time of delivery to the Court Security Officer shall be considered the date of filing. The Court Security Officer shall promptly review such pleadings and shall determine with the assistance and consultation of the attorney for the government and any personnel from any agency

necessary to make such determination, whether any of the material submitted is classified, and the level of classification of any such material. If the pleading or information does not contain any classified information, the Court Security Officer shall forward it immediately to the R.C.M. 706 Board or Article 32 Investigating Officer or Court for routine filing. If the pleading does contain classified information, or information which might lead to or cause the disclosure of classified information, the Court Security Officer shall, after consultation with the trial counsel and original classification authority:

- (1) mark it appropriately;
- (2) give a marked copy to the trial counsel;
- (3) have the original filed under seal and stored under appropriate security

conditions.

In this way, any documents containing classified information (or information believed to be classified and which must undergo a classification determination) which are filed shall be sealed by order of the Convening Authority.

6. The defense requests acknowledgement of receipt of this response. The defense further requests that the Convening Authority rescind his "Preliminary Classification Review Order" dated 17 September 2010 and amend his "Protective Order" as discussed above.

7. The POC is the undersigned at (401) 744-3007 or by e-mail at coombs@armycourt martialdefense.com.



DAVID E. COOMBS
Civilian Defense Counsel

IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES

v.

MANNING, Bradley E., PFC
U.S. Army, xxx-xx-
Headquarters and Headquarters Company, U.S.
Army Garrison, Joint Base Myer-Henderson Hall,
Fort Myer, VA 22211

**DEFENSE REPLY TO
GOVERNMENT RESPONSE
TO BILL OF PARTICULARS**

DATED: 13 March 2012

RELIEF SOUGHT

1. PFC Bradley E. Manning, by and through counsel, moves this court, pursuant to R.C.M. 906(b)(6) and the Fifth, Sixth and Eighth Amendments to the United States Constitution to direct the Government to file the particulars that the Government has indicated it was opposed to filing in its 8 March 2012 Response to the Defense Motion for Bill of Particulars ("Government Response").

BURDEN OF PERSUASION AND BURDEN OF PROOF

2. As the moving party, the Defense has the burden of persuasion. R.C.M. 905(c)(2). The burden of proof is by a preponderance of the evidence. R.C.M. 905(c)(1).

WITNESSES/EVIDENCE

3. The Defense does not request any witnesses be produced for this motion. The Defense respectfully requests this court to consider the referred charge sheet in support of its motion.

LEGAL AUTHORITY AND ARGUMENT

I. Section 1030 Offense – Exceeds Authorized Access

4. The Government states at page 2 of its Response Motion, "the defense seeks the manner in which 'PFC Manning exceeded his authorized access of a Secret Internet Protocol Router computer.'" (emphases supplied). This is exactly what the Defense is seeking. The Government states that "the purpose of a bill of particulars is to secure facts, not legal theories." *Id.* When the Defense asks "how" or "the manner in which" it is asking for the *facts* underlying the

offense, and not the legal theory of the Government. To provide some examples to help guide the Government in what the Defense is seeking, did PFC Manning steal a password and logon to the computer, thereby exceeding authorized access? Did PFC Manning electronically by-pass a security protocol or firewall, thereby exceeding authorized access? Did PFC Manning not have security privileges to enter a certain area of the SIPRNET, thereby exceeding authorized access? The Defense needs to know what *facts* underlie PFC Manning's alleged exceeding of authorized access. The Government's Response states at page 2, "the purpose of the bill of particulars is not to find out what the government knows, but what the government claims." The Defense wants to know what facts the Government "claims" amount to PFC Manning exceeding his authorized access. Only then can the Defense know how to prepare a defense.

5. The Government's claim that it has provided sufficient facts in the charge sheet is inaccurate. The charge reads as follows:¹

SPECIFICATION 13: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, between on or about 28 March 2010 and on or about 27 May 2010, having knowingly exceeded authorized access on a Secret Internet Protocol Router Network computer, and by means of such conduct having obtained information that has been determined by the United States government pursuant to an Executive Order or statute to require protection against unauthorized disclosure for reasons of national defense or foreign relations, to wit: more than seventy-five classified United States Department of State cables, willfully communicate, deliver, transmit, or cause to be communicated, delivered, or transmitted the said information, to a person not entitled to receive it, with reason to believe that such information so obtained could be used to the injury of the United States, or to the advantage of any foreign nation, in violation of 18 U. S. Code Section 1030(a) (1), such conduct being prejudicial to good order and discipline in the armed forces and being of a nature to bring discredit upon the armed forces. (emphases supplied).

While the charge provides the "where" and "when", it does not provide the far more important "how." Since the Government has proceeded to charge PFC Manning under 18 U.S.C. § 1030 for "exceeding authorized access," the Defense must know what factual acts amount to PFC Manning actually having exceeded his authorized access. The specification further refers to "such conduct" but it does not describe *what conduct*. This is what the Defense needs to know. The factual basis of the charges is not a secret and would not divulge the Government theory of the case.

II. Article 92 Offense

6. The Government has misunderstood the nature of the Defense's request for this particular. It does not seek the mechanics by which PFC Manning is alleged to have added unauthorized software. As with the previous offense, a series of questions can explain the *facts* (not legal theory) that the Defense seeks. Are you alleging that PFC Manning saved the software as a program on the computer? Are you alleging that PFC Manning ran the software from the

¹ Note that Specification 14 is identical, with the exception of what was allegedly disclosed.

compact disc drive? Are you alleging that he ran the program as an executable file on the computer desktop? The Defense seeks the factual predicate for the Government's allegation that PFC Manning has added unauthorized software in violation of Army Regulation 25-2.

III. Section 641 Offenses

7. The Defense's request does not "attempt[] to restrict the Government's proof at trial." The Defense's request specifically contemplates that the Government may be alleging that PFC Manning stole, purloined and converted. Although the Defense would maintain that there is a subtle distinction between "steal" and "purloin," the Government appropriately recognizes in its Response that there is clearly a distinction between "steal" and "convert." The Defense is asking the Government: Are you alleging that PFC Manning "stole"? Are you alleging that PFC Manning "converted"? Or, are you alleging both? This hardly restricts the Government's proof at trial. It simply identifies for the Defense what it should be prepared to defend against.

8. If the Government alleges that PFC Manning both "stole" and "converted," does this apply equally to all the charged specifications? Or, are there specifications where the Government is alleging that PFC Manning "stole" (but did not convert), or conversely that he "converted" (but did not steal). The Defense has not suggested that it will be "paralyzed" by decisions over what evidence to present. See Government Response at page 3. However, the Government should not be permitted to play "hide-the-ball" with the Defense, particularly when it has charged twenty-two (22) different specifications for what is essentially one discrete course of conduct. The Defense should not have to prepare two different "Game Plans" if the Government is relying only one of the two prongs of 18 U.S.C. § 641 (assuming, for the purposes of this motion, that there is not a large distinction between steal and purloin).

CONCLUSION

9. Based on the above, the Defense requests that the Court order the Government to file the particulars for the above requested information.

Respectfully submitted,



DAVID EDWARD COOMBS
Civilian Defense Counsel

UNITED STATES

v.

MANNING, Bradley E., PFC
U.S. Army, xxx-xx-
Headquarters and Headquarters Company, U.S.
Army Garrison, Joint Base Myer-Henderson Hall,
Fort Myer, VA 22211

**DEFENSE REPLY TO
PROSECUTION RESPONSE
TO DEFENSE MOTION TO
COMPEL DEPOSITIONS**

DATED: 13 March 2012

RELIEF SOUGHT

1. In accordance with the Rules for Courts-Martial (R.C.M.) 702(c)(2), the Defense requests that an oral deposition of the requested individuals be conducted prior to trial.

BURDEN OF PERSUASION AND BURDEN OF PROOF

2. As the moving party, the Defense has the burden of persuasion. R.C.M. 905(c)(2). The burden of proof is by a preponderance of the evidence. R.C.M. 905(c)(1).

FACTS

3. The Defense incorporates its earlier facts and supplements as follows.

4. On 28 February 2012, the Defense renewed its request for contact information for the civilian OCAs. See Attachment A. In its email, the Defense reminded the Government of the Government's promise to provide the contact information. The Government had promised on 1 February 2012 to "start working with each organization to determine the best way for the defense to contact the individuals." See Attachment B. Only after the Defense renewed its request for the contact information did the Government provide a point of contact for Mr. Robert Betz, one of the three OCAs. The Government has still not provided the Defense with the relevant contact information for Mr. Patrick Kennedy or Mr. Robert Roland.

5. At the time the Government provided the point of contact information for Mr. Betz, it also alerted the Defense to a possible "*Touhy* issue." See generally, *United States ex rel. Touhy v. Regan*, 340 U.S. 462 (1951). On 29 February 2012, the Government stated "we are still working with those organizations to determine if there is an exception to the normal process that can occur, rather than you submitting a *Touhy* request." See Attachment C. The Defense responded that it did not believe a *Touhy* request was applicable in cases where the United States was a party. *Id.* The Government replied "[a]s for *Touhy*, please look again... Because this case involves entities outside of DoD, all individuals (defense counsel or not) are required to follow the *Touhy* regulations in order to speak to those individuals." *Id.*

WITNESSES/EVIDENCE

6. The Defense does not request any witnesses be produced for this motion. The Defense respectfully requests this Court to consider the referred charge sheet in support of its motion, as well as the Attachments referenced herein.

- Attachment A: Defense Email Reiterating Request for OCA Contact Information
- Attachment B: Government Email on 1 February 2012 Responding to Defense Request for OCA Contact Information
- Attachment C: Government's *Touhy* Requirements Assertion
- Attachment D: Reducing Over-Classification Act
- Attachment E: Investigating Officer's Determination on Unsworn Declarations by OCAs

LEGAL AUTHORITY AND ARGUMENT

7. In support of its position that the Court should deny the Defense's request, the Government states that once an Original Classification Authority (OCA) makes a classification determination it is presumed proper, and it is not the province of this Court to question that determination. *See* Prosecution Response to Defense Motion to Compel Depositions at page 7. The Government fails to appreciate the limitations of the classification determination in regards to the charged offenses. Classification determinations alone do not satisfy the *mens rea* requirement of 18 U.S.C. § 793(e). *United States v. Diaz*, 69 M.J. 127, 133 (C.A.A.F. 2010) (holding that although "classification may demonstrate that an accused has a reason to believe that information relates to national defense and could cause harm to the United States... not all information that is contained on a classified or closed computer system pertains to national defense. Likewise, not all information that is marked as classified, in part or in whole, may in fact meet the criteria for classification.").

8. The Defense, contrary to the Government's assertion, has not conflated damage and potential impact on security. Instead, the Defense simply appreciates the limitations of the OCA classification determination. An OCA classification determination does not necessarily equate to proof that the accused knew or had a reason to believe the charged information could be used to the injury of the United States or to the advantage of any foreign nation.

9. The Government wants to treat the OCAs' determinations as the final statement regarding whether something "could" cause damage. *See* Prosecution Response to Defense Motion to Compel Depositions at page 7. A classification determination is not conclusive on the question of whether information "could" cause damage to the United States or be used to the advantage of any foreign nation. *United States v. Morison*, 844 F.2d 1057, 1086 (4th Cir.), *cert denied*, 488 U.S. 908 (1988). At most, the OCA determination is merely probative of the issue regarding whether information could cause damage to the United States. *Id.* at 1086 ("... I assume we reaffirm today, that notwithstanding information may have been classified, the government must still be required to prove that it was *in fact* 'potentially damaging ... or useful,' i.e., that the fact

of classification is merely probative, not conclusive, on that issue...") (emphasis in original.) Additionally, while the OCAs' determinations were at one point in history "worthy of great deference," such is not necessarily the case anymore. The United States has acknowledged that it has a problem with over-classification. See Attachment D (passage of the Reducing Over-Classification Act by President Barack Obama on 7 October 2010 in order to attempt to deal with the problem of Government over-classification). Such a problem calls into question a determination whether certain items "could" cause damage based solely on the basis of its classification. As Justice Stewart of the Supreme Court so aptly stated in regards to the Pentagon Papers, "for when everything is classified, then nothing is classified. . ." *New York Times v. United States*, 403 U.S. 713, 729 (1971).

10. The OCA classification determination are only "conclusive on the question of authority to possess or receive the information." *Morison*, 844 F.2d at 1086. Whether the accused, in fact, knew or had a reason to believe the charged information could be used to the injury of the United States or to the advantage of any foreign nation is not determined by the OCA. *Id.* at 1086 (detailing the appropriate limitations of classification determinations to only the question of authority to possess or receive the information by holding "[t]his must be so to avoid converting the Espionage Act into the simple Government Secrets Act which Congress has refused to enact.").

11. Given the fact the OCA determinations are merely probative on the element of the 18 U.S.C. § 793(e) offense, the Defense should be entitled to examine the basis for the OCA determinations as to why the information was classified and the OCA's belief regarding whether the reviewed information really "could" cause damage to national security. The Defense was not given the ability to question the OCAs at the Article 32 hearing. The OCAs were essential witnesses that should have been produced. Their testimony went to the heart of one of the elements of the charged offenses. The Investigating Officer failed to appreciate the significance of the requested witnesses' testimony and improperly determined that each OCA witness was not reasonably available.

12. The Investigating Officer did not provide any support or reasons to buttress his conclusion that the OCAs were "not reasonably available." *United States v. Samuels*, 1959 WL 3613 (C.M.A.) (the investigating officer should set out the circumstances upon which the conclusion of the unavailability is predicated). Instead, the Investigating simply adopted the Government's bald assertions that the witnesses were unavailable. As the Government acknowledges, two of the requested OCAs, Mr. Robert Betz and LtGen Robert Schmidle, were stationed at Fort Meade, Maryland. It is indefensible to suggest that neither was "reasonably available" to be produced at the Article 32 which was held at the OCAs' home base. The Investigating Officer ignored the Defense's request to require the government to at least inquire as to whether the OCA witnesses were available. Instead, the Investigating Officer chose to rely upon a rote recitation of the test for availability.

13. Once he determined that the OCA witnesses were not available, the Investigating Officer

proceeded to consider the unsworn statements of each of the OCAs.¹ Due to the Investigating Officer's determination, the Defense did not have an opportunity to cross-examine the OCAs at the Article 32. It is without question that the OCAs were vital witnesses. The Government justified repeated delays for over a year in order to obtain their classification reviews. If the OCA determinations were not vital, the Government would not have gone to such great lengths to ensure that the Investigating Officer consider the OCAs' unsworn statements.²

14. In addition to arguing that the Investigation Officer's determination on availability of the OCAs was correct, the Government argues that the Defense has incorrectly cited authority for its requested relief. The Government attempts to distinguish the cited authority cited by stating "none of the cases are factual on point, in that none of them deal with a deposition being requested apart from a request to reopen an Article 32..." This "critique" is without merit. The cases cited by the Defense deal with the enforcement of pretrial rights—the right of the accused to have the presence of a "key witness" at the Article 32. The cases also support the proposition that "if an accused is deprived of a substantial pretrial right on timely objection, he is entitled to judicial enforcement of this right, without regard to whether such enforcement will benefit him at trial." See *United States v. Chuculate*, 5 M.J. 143, 144-45 (C.M.A. 1978). Contrary to the Government's assertion, this standard of review is not limited to reopening the Article 32. Instead, it applies to the *enforcement* of a substantial pretrial right. *Id.* at 145.³ Such enforcement is within the discretion of the military judge, and may be in the form of reopening the Article 32 or (as in this case) ordering a deposition.

15. The Government argues that the Defense's request is not timely in that there is no evidence that any of the requested witnesses will not be available for trial. The Government also states that it will "provide defense counsel with timely and meaningful access to all trial witnesses as the prosecution did at the Article 32." This promise by the Government to provide access as it "did at the Article 32" is why the Defense is requesting relief from the Court.

16. At the Article 32, the Government relied upon the importance of the duty positions of the various OCAs to deny access. In its response to the motion to compel depositions, the Government repeated this argument, and also pointed to the fact that "[b]eing an original classification authority was only one of ...[the stated OCA's] many responsibilities." See

¹ Although CPT Kolky is not an OCA, he is the individual the Government chose to conduct the classification review of Apache video. As such, he is the only witness that the Defense is aware of that could speak to the classification review.

² The Defense maintains its position that the Investigating Officer improperly considered, over Defense objection, the OCAs' unsworn statements under R.C.M. 405. Significantly, the Investigating Officer did not determine the unsworn declarations were in fact sworn declarations under R.C.M. 405. Instead, the Investigating Officer determined that although the OCA statements were unsworn, they carried with them the same "indicia of reliability" as sworn statements. See Attachment E.

³ The *Chuculate* decision cites several examples of judicial enforcement of a substantial pretrial right such as: *United States v. Mickel*, 9 U.S.C.M.A. 324, 26 C.M.R. 104 (1958) (failure to provide Article 27(b) qualified counsel at an Article 32 hearing was a substantial pretrial right capable of judicial enforcement); *United States v. Donaldson*, 23 U.S.C.M.A. 293, 49 C.M.R. 542 (1975) (properly convened Article 32 investigation was a substantial pretrial right capable of judicial enforcement); *United States v. Ledbetter*, 2 M.J. 37 (C.M.A. 1976) (presence of key witnesses at Article 32 hearing was a substantial pretrial right capable of judicial enforcement); *United States v. Chestnut*, 2 M.J. 84 (C.M.A. 1976) (failure to grant a motion for continuance to depose a witness (who was actually present for trial purposes) denial of a substantial pretrial right capable of judicial enforcement).

Prosecution Response to Defense Motion to Compel Depositions at 12. However, perhaps most troubling is the Government's recent reliance on *Touhy* regulations to restrict the Defense's access to the civilian OCAs. See Attachment C.

17. The Defense exchanged numerous emails with the Government in an attempt to flush out the Government's position on *Touhy* and how that would impact a ruling by the Court. Shockingly, the Government asserted that it first became aware of the possible *Touhy* issue earlier that very week (apparently from the requested OCAs). Such an admission by the Government is evidence of the Government's lack of due diligence in this case. The fact that the Defense wanted to interview the relevant OCAs was not a surprise to the Government. The Defense had requested that these witnesses be present at the Article 32; requested from both the SPCMA and GCMCA to depose the relevant OCA witnesses; and requested contact information for the relevant OCAs. The fact that the Government was just now finding out that *Touhy* requirements may apply is inexcusable.

18. Ultimately, the Government appears to have restricted its interpretation of *Touhy* requirements to only the Defense's access to the non-DoD OCA witnesses. The Government does not seem to understand that discovery and access to witnesses flows through the trial counsel. The Government cannot hide behind *Touhy*. This is especially so if the Government actually has had access to the witness (i.e. to interview that person). In this instance, the Government has had access to the relevant OCAs. The Government's position, requiring the Defense to submit a *Touhy* request, is yet another example of the Government impeding the defense's access to these witnesses, and is also in violation of Article 46, UCMJ.

19. The Government's position on witness availability ignores the practical realities of the situation. Each of the OCAs is either a General Officer or a high ranking civilian employee.⁴ Their respective duty positions require more than your average witness coordination. The Defense cannot simply drop by the OCAs' duty location or pick up a phone and call a specific OCA. The Defense would need to coordinate with each OCA to obtain a time and place for the interview. Given the topic of discussion, the interview would have to be in person, and at an approved location. Assuming the OCAs did agree to be interviewed, the Defense could not dictate the time or the location of the interview. The relative difficulty of dealing with different OCAs and given the location of each OCA almost assures that any interview would not take place in advance of trial.

20. The interviews of the OCAs should have taken place as part of the Article 32. The fact that these witnesses were improperly denied has placed the Defense in the position of relying upon the OCAs to make themselves available for (an adversarial) interview or upon the Government to coordinate access to these witnesses.

21. Given the improper denial by the Article 32 Investigating Officer of these witnesses; the Government's previous actions of refusing to provide contact information for the civilian OCAs; the Government's last-minute *Touhy* position; and the practical difficulties involved in

⁴ This is true for each individual that conducted a classification determination with the exception of CPT James Kolky.

interviewing the requested OCAs, the Defense respectfully requests that the Court grant the Defense's request to depose these witnesses.

V. RELIEF REQUESTED

22. Accordingly, pursuant to the Rules for Courts-Martial (R.C.M.) 702(c)(2), the Defense requests that an oral deposition of the above-listed OCAs be conducted prior to trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David E. Coombs', with a stylized flourish at the end.

DAVID EDWARD COOMBS
Civilian Defense Counsel

ATTACHMENT A

David Coombs

From: David Coombs <coombs@armycourtartialdefense.com>
Sent: Tuesday, February 28, 2012 2:18 PM
To: 'Fein, Ashden CPT USA JFHQ-NCR/MDW SJA'
Cc: 'Matthew kemkes'; 'Paul Bouchard'; 'Joshua Tooman'; 'Melissa Santiago'; 'Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA'; 'Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA'; 'Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA'; 'Ford, Arthur D. WO1 USA JFHQ-NCR/MDW SJA'
Subject: Defense Time line
Attachments: Draft Timeline.pdf

Ashden,

Attached is the Defense's draft timeline. I believe that for the most part we line up on the general grouping. As mentioned before, you have a lot more time built into your Phase 3 and Phase 4 motions. I have combined those phases.

Also, given the unanticipated three week extension on the initial motions, the Defense will be submitting only one time line instead of two. If the Court orders the depositions, the Defense will request that the depositions occur before the end of March in order to avoid any unnecessary delay.

Lastly, I was wondering if the Government had contact information for the civilian OCAs? You had told me on 1 February 2012, that you would be providing this information to me. I would like to be able to speak, in general with each of the OCAs prior to the deposition (if ordered) and if a deposition is not ordered, to explore calling each as a Defense witness.

Let me know if you have any questions.

Best,
David

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ATTACHMENT B

David Coombs

From: Fein, Ashden CPT USA JFHQ-NCR/MDW SJA <Ashden.Fein@jfhqncr.northcom.mil>
Sent: Wednesday, February 01, 2012 6:12 PM
To: coombs@armycourt martialdefense.com
Cc: Matthew kemkes; Bouchard, Paul R CPT USARMY (US); Tooman, Joshua J CPT USARMY (US); Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA; Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA; Ford, Arthur D. WO1 USA JFHQ-NCR/MDW SJA; Melissa Santiago
Subject: RE: 4 of 4
Attachments: 120201-Defense Computer Forensics Expert Consultants.pdf; 120201-GCMCA Response to Request for Oral Depositions.pdf

David,

Absolutely. We will start working with each organization to determine the best way for the defense to contact the individuals.

Attached are the GCMCA's decisions on the Defense Computer Forensic Experts and the Deposition Requests.

Have a good night.

v/r
Ashden

-----Original Message-----

From: coombs@armycourt martialdefense.com
[mailto:coombs@armycourt martialdefense.com]
Sent: Tuesday, January 31, 2012 5:42 PM
To: Fein, Ashden CPT USA JFHQ-NCR/MDW SJA
Cc: Matthew kemkes; Bouchard, Paul R CPT USARMY (US); Tooman, Joshua J CPT USARMY (US); Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA; Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA; Ford, Arthur D. WO1 USA JFHQ-NCR/MDW SJA; Melissa Santiago
Subject: RE: 4 of 4

Ashden,

I would like to explore the possibility of calling these individuals as defense witnesses. Please be so kind as to provide contact information for them. Thank you.

Best,
David

David E. Coombs, Esq.
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11 South Angell Street, #317
Providence, RI 02906
Toll Free: 1-800-588-4156
Local: (508) 689-4616

ATTACHMENT C

David Coombs

From: Fein, Ashden CPT USA JFHQ-NCR/MDW SJA <Ashden.Fein@jfhqncr.northcom.mil>
Sent: Wednesday, February 29, 2012 9:10 AM
To: David Coombs
Cc: Matthew kemkes; Paul Bouchard; Joshua Tooman; Melissa Santiago; Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA; Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA; Ford, Arthur D. WO1 USA JFHQ-NCR/MDW SJA
Subject: Multiple Items
Attachments: 1202XX-Government Proposed Case Calendar (DRAFT for DEFENSE 2).pdf

David,

Scheduling:

1. We made most of the changes you recommended based on time phasing.
2. The reason we have Motions to Compel a second time, is that we are planning for a second round from the defense, understanding that you have not intimidated such, but it seems likely considering the amount of information in this case and based on potential rulings of the military judge, if favorable to the defense.
3. We are confused by your addition of the "Defense Request for Amended Section III Disclosure" for the next motions hearing. The Court already ruled on this issue, and instructed the defense to seek clarification if something is confusing- is there something that you and the other counsel do not understand on our disclosure? Please let us know so we may assist.
4. During our second 802 conference, after the defense offered to waive continued and future searching of Government records for Brady/Giglio information, the Court instructed the parties to essentially determine whether there can be a waiver of the accused's right for the prosecution to discover brady/giglio material. The Court did not state that this would be the subject of a motions hearing the next time we go on the record, as memorialized in the military judge listing the motions we are arguing in her post-arraignment 802 conference summary email. We have been and plan on working with multiple entities, including GAD and our State Bars, to determine if this can occur. As we stated during the conference, the United States does not oppose this limitation; HOWEVER we are not clear whether this waiver can occur both from a legal and ethical standpoint, and we do not know the effect it would have for IAC purposes on appeal. As we continue to research this issue, we welcome the defense's assistance to provide us their authorities on the legal, ethical, and prevention of IAC issues. Please take into account that this proposed waiver/limitation will likely include the prosecution not discovering some mitigating evidence for sentencing purposes, if any, even though the prosecution will intend to put on an aggravation case.
5. We do not agree that phases 4 and 5 should be combined. In a "normal" case that involves a spattering of classified information from one or two OCAs, we would agree. However because this case involves more than ten OCAs that are inside and outside DoD, we do not think it is realistic to combine unclassified and classified evidentiary motions. Additionally, the United States intends to offer for admission more than 20 items of digital media and more than seventy-five different pieces of documentary evidence. It is more realistic to space these two phases out and allow for adequate time for the Court to consider pre-authentication and pre-admission of the evidence and then pre-qualification of the many experts. For planning purposes, we are assuming the defense will not

stipulate to admission of the evidence or qualifications of the experts- if we are incorrect in that assumption then please let us know and we will adjust our calendar and the way forward.

6. We agree that the timelines will adjust if the Court orders depositions, but we have chosen to give a proposal based on the information today and not contingencies based on Court rulings. We also predict that this schedule will shift more to the right based on additional defense motions, as in most cases- but as you know, that is not in our control.

OCA Contact Information:

Since 1 February 2012, the prosecution has been working with the different organizations to determine the best way for the defense to contact the individuals. For Mr. Betz, please contact LTC Lisa Gumbs, OSJA, CYBERCOM at llgumbs@nsa.gov. She is the POC at CYBERCOM. As for the OCA for Specifications 3 and 15 of Charge II and Ambassador Kennedy, we are still working with those organizations to determine if there is an exception to the normal process that can occur, rather than you submitting a Touhy request. While we continue to work on the possibility of an exception under each organization's housekeeping rules, would you like us to concurrently assist you in obtaining their Touhy information?

ASUs:

BLUF-The command needs your client's to give them money and there is no way to bill him or the HCCF. However, it appears the command has one of PFC BM's check in their possession which CPT Bouchard or a member of the defense could use to obtain the money.

From the command: We won't be able to take the money from HCCF. PFC BM was sent with three checks from the JRCF, we deposited two at HCCF. We still have the third. We could have him coordinate with either his lawyer or his family to have the check cashed, give us the amount needed to purchase his uniforms and then he can instruct his family/lawyer on what to do with the remaining amount. Otherwise the only other idea would be to draft a memo for PFC BM to sign stating that he wants to purchase the uniforms and to have his lawyer release the funds to us.

Address of HCCF:

We are still working with PMO to determine if the HCCF location/address should be given out. We think this information is FOUO//LES to protect PFC BM and the facility. If that is the answer, then we will come up with a proposal to ensure he can still receive the mail.

Protective Order:

We are still working with DoJ and DA experts on the procedures for the protective order and coordinating with many of the OCAs. Hopefully by COB tomorrow, I will have an answer to your question as to whether we envision a process that has the CSO going directly with the OCAs.

V/r
Ashden

David Coombs

From: David Coombs <coombs@armycourtmartrialdefense.com>
Sent: Wednesday, February 29, 2012 10:25 AM
To: 'Fein, Ashden CPT USA JFHQ-NCR/MDW SJA'
Cc: 'Matthew kemkes'; 'Paul Bouchard'; 'Joshua Tooman'; 'Melissa Santiago'; 'Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA'; 'Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA'; 'Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA'; 'Ford, Arthur D. WO1 USA JFHQ-NCR/MDW SJA'
Subject: RE: Multiple Items

Ashden,

1. I see that you have made some changes in your time line.
2. I believe you should exercise the same logic that you do in your point #6. I do not believe we should be building in lengthy delays based upon a Motion to Compel that has not been filed and may not be filed. If the Government provides the requested discovery either to the Defense or to the Court for a in camera review under M.R.E. 505(i), the Defense does not anticipate further discovery requests.
3. Disregard. I reconsidered the issue.
4. I think you may be misconstruing your obligations under *Brady*. You do not need to look any further that R.C.M. 905(b)(4) and the *Williams* case to see that your obligation to search is much more limited than you represented in the 802 session. *U.S. v. Williams*, 50 M.J. 436 (C.A.A.F. 1999) ("[1] The scope of the due-diligence requirement with respect to governmental files beyond the prosecutor's own files generally is limited to: (1) the files of law enforcement authorities that have participated in the investigation of the subject matter of the charged offenses. *see, e.g., United States v. Bryan*, 868 F.2d 1032 (9th Cir.), *cert. denied*, 493 U.S. 858, 110 S.Ct. 167, 107 L.Ed.2d 124 (1989); (2) investigative files in a related case maintained by an entity "closely aligned with the" prosecution. *see, e.g., United States v. Hankins*, 872 F.Supp. 170, 172 (D.N.J.), *aff'd*, 61 F.3d 897 (3d Cir.), *cert. denied*, 516 U.S. 968, 116 S.Ct. 427, 133 L.Ed.2d 343 (1995); and (3) other files, as designated in a defense discovery request, that involved a specified type of information within a specified entity. *see, e.g., United States v. Veksler*, 62 F.3d 544, 550 (3d Cir.1995)."). You seem to believe that your *Brady* obligations require you to search every filing cabinet of the U.S. Government. That simply is not (and cannot be) the case. Otherwise, *Brady* obligations would be carried to the point of absurdity. The Defense (and the Court) cannot be in a position to evaluate whether you have taken diligent steps to ensure that your *Brady* obligations have been satisfied unless you provide those steps to us. So, I believe you should be prepared to detail: a) what the Government has done over the last year and a half to obtain *Brady* material and; b) the steps that you are planning to take to ensure you are complying with your obligations. Only that way can we evaluate whether your steps are/have been sufficient, and whether your proposed steps are necessary. A point of clarification on the waiver issue: The Defense will not be waiving the right to *Brady* material. We simply believe that searching, for instance, the U.S. Department of Agriculture files, will not yield *Brady* material. As such, the Defense will waive what it believes are unnecessary searches which are not at all likely to yield *Brady* material (and thus believes are not part of the Government's due diligence obligations). I hope this clarifies the issue for you. If need be, we can address it with the judge.
5. We will have to agree to disagree on this point. With regards to your experts and evidence, this can easily be taken care of pursuant to the Defense timeline shortly before trial.

6. I don't believe the time line needs to adjust if the depositions are ordered. Instead, I would recommend that the Government starts planning on the possibility that the depositions will be ordered so that we can complete them in the short term. The Defense will recommend that the depositions take place at the end of March.

OCA contact: I will reach out to LTC Gumbs. With regards to the other OCAs, I am not really sure why you referenced *Touhy*. See *Alexander v. Federal Bureau of Investigation*, 186 F.R.D. 66 (D.D.C. 1998) ("The Supreme Court's holding in *Touhy* is applicable only in cases where the United States is not a party to the original legal proceeding. ... *Touhy* simply holds that a subordinate government official will not be compelled to testify or to produce documents in private litigation, in which the federal government or any of its agencies is not a party in cases where a departmental regulation prohibits disclosure in the absence of consent by the head of the department. In cases originating in federal court in which the federal government is a party to the underlying litigation, the *Touhy* problem simply does not arise. In such cases, there is no requirement that the litigant proceed under the APA and file a separate lawsuit in order to obtain testimony from a witness.")

ASUs – Just have the commander contact me and I will pay for the ASUs.

HCCF: Please let me know by COB. PFC Manning's family plans to release the contact information so that supporters can send mail to him. Mail that was recently sent to the JRCF has been returned to sender instead of forwarded to Howard County. I recommend instructing the JRCF to start forwarding mail to the following address:

Howard County Department of Corrections
7301 Waterloo Road, P.O. Box 250
Jessup, Maryland 20794

Protective Order: I plan to submit my revised protective order later today. I have adjusted the process to eliminate what I believe was your major hang up – that somehow the CSO would be trumping the OCA. This was never the case under my original protective order, but I have spelled it out clearly under the revised order.

Best,
David

David E. Coombs, Esq.
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11 South Angell Street, #317
Providence, RI 02906
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-----Original Message-----

From: Fein, Ashden CPT USA JFHQ-NCR/MDW SJA [mailto:Ashden.Fein@jfhqncr.northcom.mil]
Sent: Wednesday, February 29, 2012 9:10 AM

David Coombs

From: Fein, Ashden CPT USA JFHQ-NCR/MDW SJA <Ashden.Fein@jfhqncr.northcom.mil>
Sent: Wednesday, February 29, 2012 10:59 AM
To: David Coombs
Cc: Matthew kemkes; Paul Bouchard; Joshua Tooman; Melissa Santiago; Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA; Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA; Ford, Arthur D. WO1 USA JFHQ-NCR/MDW SJA
Subject: RE: Multiple Items

David,

Thank you.

As for the Brady issue, we agree with your assertions below; however this is all predicated on what information the prosecution knows exists or could exist, and we recognize that you are not privy to our work product to know this information. We agree that it would be absurd to require the prosecution to search the entire government and we are not claiming that is what we think we need to do or should do. On the contrary, from the beginning of this case, the prosecution developed criteria to determine whether we have a good faith basis or not to search for Brady/Giglio information at certain organizations. This issue will likely need to be extensively briefed, and I recommend we discuss in conference with the military judge on the best way to go forward and not until the next hearing. The reason is so we can determine all the different steps that will be required to have this limitation- such as under a protective order which the court orders the prosecution to limit their search (Rules of Ethics applications) or whether the defense should motion the court to limit discovery, etc.

As for Touhy, please look again. The issue right now is you speaking with the government officials outside of court-proceedings. The normal process for anyone outside the United States government to speak to an official is to request under each organization's Touhy regulations. I know that in the military justice system we are used to the process of having defense counsel go direct with DoD representatives, such as commanders, 1SGs, doctors, etc., and not filing a Touhy request because that is authorized in our Touhy regulations (AR 27-40). Because this case involves entities outside of DoD, all individuals (defense counsel or not) are required to follow the Touhy regulations in order to speak to those individuals. As we committed on 1 February, we are still working with those organizations to determine if there is an exception to the normal process that can occur, rather than you submitting a Touhy request.

We will have the command contact you immediately for the uniform money.

v/r
Ashden

-----Original Message-----

From: David Coombs [mailto:coombs@armycourt martialdefense.com]
Sent: Wednesday, February 29, 2012 10:25 AM
To: Fein, Ashden CPT USA JFHQ-NCR/MDW SJA
Cc: Matthew kemkes; 'Paul Bouchard'; 'Joshua Tooman'; 'Melissa Santiago'; Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA; Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA; Ford, Arthur D. WO1 USA JFHQ-NCR/MDW SJA
Subject: RE: Multiple Items

David Coombs

From: David Coombs <coombs@armycourtartialdefense.com>
Sent: Wednesday, February 29, 2012 11:16 AM
To: 'Fein, Ashden CPT USA JFHQ-NCR/MDW SJA'
Cc: 'Matthew kemkes'; 'Paul Bouchard'; 'Joshua Tooman'; 'Melissa Santiago'; 'Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA'; 'Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA'; 'Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA'; 'Ford, Arthur D. WO1 USA JFHQ-NCR/MDW SJA'
Subject: RE: Multiple Items

Ashden,

1. I do not believe anything needs to be extensively briefed. The Government simply needs to provide a statement of due diligence to the Defense and Court. Only then can we be in a position to determine whether a motion or a Court Order is necessary. In other words, you seem to have the process backwards. Moreover, you committed in the 802 session to provide the Court and the Defense this information. Am I to understand that you are now resiling from this commitment?
2. Please point me to the relevant regulations/instructions/authority that you are relying upon to state *Touhy* even applies in a criminal context. Would the Government's position be that a *Touhy* request is necessary if the Court orders a deposition? In addition, is it your position that you have been looking into this issue for almost a month to determine if there is an exception to the "normal" process, and still do not have an answer?

Best,
David

David E. Coombs, Esq.
Law Office of David E. Coombs
11 South Angell Street, #317
Providence, RI 02906
Toll Free: 1-800-588-4156
Local: (508) 689-4616
Fax: (508) 689-9282
coombs@armycourtartialdefense.com
www.armycourtartialdefense.com

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-----Original Message-----

From: Fein, Ashden CPT USA JFHQ-NCR/MDW SJA [mailto:Ashden.Fein@jfhqncr.northcom.mil]
Sent: Wednesday, February 29, 2012 10:59 AM
To: David Coombs
Cc: Matthew kemkes; Paul Bouchard; Joshua Tooman; Melissa Santiago; Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA; Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA; Ford, Arthur D.

David Coombs

From: David Coombs <coombs@armycourtartialdefense.com>
Sent: Thursday, March 01, 2012 8:23 AM
To: 'Fein, Ashden CPT USA JFHQ-NCR/MDW SJA'
Cc: 'Matthew kemkes'; 'Paul Bouchard'; 'Joshua Tooman'; 'Melissa Santiago'; 'Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA'; 'Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA'; 'Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA'; 'Ford, Arthur D. WO1 USA JFHQ-NCR/MDW SJA'
Subject: RE: Multiple Items

Ashden.

Please respond to point 2 in my previous email. Thanks.

Best,
David

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Providence, RI 02906
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Cc: 'Matthew kemkes'; 'Paul Bouchard'; 'Joshua Tooman'; 'Melissa Santiago'; 'Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA'; 'Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA'; 'Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA'; 'Ford, Arthur D. WO1 USA JFHQ-NCR/MDW SJA'
Subject: RE: Multiple Items

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David Coombs

From: Fein, Ashden CPT USA JFHQ-NCR/MDW SJA <Ashden.Fein@jfhqncr.northcom.mil>
Sent: Thursday, March 01, 2012 9:02 AM
To: David Coombs
Cc: Matthew kemkes; Paul Bouchard; Joshua Tooman; Melissa Santiago; Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA; Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA; Ford, Arthur D. WO1 USA JFHQ-NCR/MDW SJA
Subject: RE: Multiple Items

David,

The United States has been working since 1 February on a method outside of the normal process for the defense to have access to government officials, rather than you submitting a Touhy request. The Touhy regulations do apply in criminal context and I am sure you will find many criminal cases that reference the Touhy regulations. I recommend starting with ACCA's unpublished opinion in *US v. Kitmanyen* (ARMY 20110609). Although the legal issue in this case is not on point, it is clear that ACCA considered Touhy as part of the criminal process, but that case Touhy was at issue as part of the judicial process-subpoenas.

As I wrote earlier, the issue at bar is the defense speaking with these government officials outside of court-proceedings. Your request on 1 February was to speak with the government representatives as potential defense witnesses. We are trying to assist the defense with that request, but you are still welcome to submit a Touhy request to the organizations. If you would like us to concurrently obtain the Touhy request information for you, please let us know.

If the Court orders any depositions, then we will address any Touhy issues, if they exist, with each non-DoD entity and the Court.

v/r
Ashden

-----Original Message-----

From: David Coombs [mailto:coombs@armycourt martialdefense.com]
Sent: Wednesday, February 29, 2012 11:16 AM
To: Fein, Ashden CPT USA JFHQ-NCR/MDW SJA
Cc: Matthew kemkes; 'Paul Bouchard'; 'Joshua Tooman'; 'Melissa Santiago'; Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA; Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA; Ford, Arthur D. WO1 USA JFHQ-NCR/MDW SJA
Subject: RE: Multiple Items

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1. I do not believe anything needs to be extensively briefed. The Government simply needs to provide a statement of due diligence to the Defense and Court. Only then can we be in a position to determine whether a motion or a Court Order is necessary. In other words, you seem to have the process backwards. Moreover, you committed in the 802 session to provide the

David Coombs

From: David Coombs <coombs@armycourtmarialdefense.com>
Sent: Thursday, March 01, 2012 12:22 PM
To: 'Fein, Ashden CPT USA JFHQ-NCR/MDW SJA'
Cc: 'Matthew kemkes'; 'Paul Bouchard'; 'Joshua Tooman'; 'Melissa Santiago'; 'Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA'; 'Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA'; 'Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA'; 'Ford, Arthur D. WO1 USA JFHQ-NCR/MDW SJA'
Subject: RE: Multiple Items

Ashden,

With regards to Touhy, the Defense's position is that Touhy does not apply in criminal cases. Only three military cases even reference Touhy, and none support the proposition that Touhy applies in a court-martial. However, I want to make sure that I understand the Government position on this issue.

- 1) Does the Government agree that Touhy does not apply in regards to CPT Kolky; RADM Donegan; Mr. Betz; LtGen Schmidle; VADM Harward; and RADM Woods?
- 2) Is it the Government's position that Touhy requirements apply to Mr. Kennedy?
 - a) IF YES - Please provide the current regulation from the DOS regarding Touhy request requirements.
 - b) Will Mr. Kennedy cooperate in an informal interview with the Defense without a Touhy request?
 - c) Will Mr. Kennedy cooperate with a deposition ordered by the Court without a Touhy request?
 - d) Will the DOS provide the requested damage assessments/documents if the motion to compel discovery is granted without a Touhy request?
- 3) Is it the Government's position that Touhy requirements apply to the OCA of Specification 3 and 15 of Charge II?
 - a) IF YES - Please provide the current regulation from the OCAs organization regarding Touhy request requirements.
 - b) Will the OCA cooperate in an informal interview with the Defense without a Touhy request?
 - c) Will the OCA cooperate with a deposition order by the Court without a Touhy request?
 - d) Will the OCA's organization provide the requested damage assessments/documents if the motion to compel discovery is granted without a Touhy request?
- 4) What steps, if any, are you undertaking to persuade any organization that may believe a Touhy request is required to waive such a requirement?
- 5) How long has the Government known that there may be a Touhy issue?

Please let me know if you have any questions.

Best regards,

David Coombs

From: Fein, Ashden CPT USA JFHQ-NCR/MDW SJA <Ashden.Fein@jfhqncr.northcom.mil>
Sent: Thursday, March 01, 2012 7:18 PM
To: David Coombs
Cc: Matthew kemkes; Paul Bouchard; Joshua Tooman; Melissa Santiago; Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA; Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA; Ford, Arthur D. WO1 USA JFHQ-NCR/MDW SJA
Subject: RE: Multiple Items

David,

A. For your client's mail:

Supporters or family may send mail to:
Commander, HHC USAG
Attn: PFC Manning
239 Sheridan Ave, Bldg 417
JBM-HH, VA 22211

The mail will be logged once it is received at the company. Mail will be collected until a command visit and then it will be brought to the facility.

Mail will be screened in accordance with the inmate hand book at the HCCF and then given to PFC Manning. If it must be returned or destroyed for any reason then that will be annotated on the log. PFC Manning will sign the log to indicate that he received that mail on that day.

B. As for your Touhy information request below:

1. Yes. According to DoDD 5405.2 and AR 27-40, Touhy appears to not apply to access to DoD/DA personnel or information for courts-martial.
2. We are working with the organization to determine an appropriate response and the way forward. I searched the CFR and found 22 CFR Part 172.
3. We are working with the organization to determine an appropriate response and the way forward. I searched the CFR and found the cite. If you call, I can give it to you over the phone so long as it is stored separate and apart from your email based on the sensitive nature; however I recommend typing the organization's name and "Touhy" in google, and you will be pointed to the citation.
4. We have been working with the organizations to determine if there is a streamlined process either through the Touhy process or as an exception. We have also made it clear that if Touhy is the only way and it does not hinder the process, that we as the military prosecution intend to submit the documents for the defense, once the defense completes the requirements.
5. Early this week, the prosecution became aware that the normal course for all defense counsel is to submit a Touhy request. Prior to then and continuing today, the prosecution has worked to see if there was a streamlined process to obtain the information.

C. Uniforms: The command will contact you tomorrow.

D. EnCase images: As previously stated, based on the defense preservation request, the United States preserved all the drives that could be reasonably located in the government. As we prepare for our motion response, we are updating the status of these drives to understand the population that exists and finalizing whether any of them are discoverable (and produce them) or potentially discoverable (if the military judge rules in favor of the defense).

v/r
Ashden

-----Original Message-----

From: David Coombs [mailto:coombs@armycourtartialdefense.com]

Sent: Thursday, March 01, 2012 12:22 PM

To: Fein, Ashden CPT USA JFHQ-NCR/MDW SJA

Cc: Matthew kemkes; 'Paul Bouchard'; 'Joshua Tooman'; 'Melissa Santiago'; Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA; Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA; Ford, Arthur D.

WO1 USA JFHQ-NCR/MDW SJA

Subject: RE: Multiple Items

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1) Does the Government agree that Touhy does not apply in regards to CPT Kolky; RADM Donegan; Mr. Betz; LtGen Schmidle; VADM Harward; and RADM Woods?

2) Is it the Government's position that Touhy requirements apply to Mr. Kennedy?

a) IF YES - Please provide the current regulation from the DOS regarding Touhy request requirements.

b) Will Mr. Kennedy cooperate in an informal interview with the Defense without a Touhy request?

c) Will Mr. Kennedy cooperate with a deposition ordered by the Court without a Touhy request?

d) Will the DOS provide the requested damage assessments/documents if the motion to compel discovery is granted without a Touhy request?

3) Is it the Government's position that Touhy requirements apply to the OCA of Specification 3 and 15 of Charge II?

a) IF YES - Please provide the current regulation from the OCAs organization regarding Touhy request requirements.

b) Will the OCA cooperate in an informal interview with the Defense without a Touhy request?

David Coombs

From: David Coombs <coombs@armycourtmarshaldefense.com>
Sent: Friday, March 02, 2012 12:11 PM
To: 'Fein, Ashden CPT USA JFHQ-NCR/MDW SJA'
Cc: 'Matthew kemkes'; 'Paul Bouchard'; 'Joshua Tooman'; 'Melissa Santiago'; 'Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA'; 'Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA'; 'Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA'; 'Ford, Arthur D. WO1 USA JFHQ-NCR/MDW SJA'
Subject: RE: Multiple Items

Ashden,

I've spent the past couple of days trying to wrap my mind around your *Touhy* issue, and I can't seem to process what you think this means going forward. If I understand what you are saying, despite the Government's discovery obligations under *Williams*, you think there is an additional impediment (the *Touhy* request) to the Defense getting discovery? So, even if a judge determines that the material is relevant and should be disclosed, you (the Government) will not disclose it and will require the Defense to go through cumbersome administrative channels to try to obtain this material? Ultimately, as you likely know, the agencies will deny access to these materials because they are classified, and that is one of the bases for denial of a *Touhy* request. So, even if you are ordered to produce this material, it will not be produced because of bureaucratic red-tape.

I'm sorry to be beating a dead horse, but if this is your position, it seems utterly crazy to me. Moreover, I don't understand how the Government was able to provide other discovery from agencies outside the DOD, under your view, absent a *Touhy* request? With the discovery you already provided, you searched other agencies and provided the Defense with the relevant materials. Why is this any different? Are you saying it's different because in one scenario, the Government handed things over voluntarily, but in the other scenario, the Government would be handing things over pursuant to a Motion to Compel? If that's the case, then couldn't the Government simply deny discovery of materials it didn't want to hand over to the Defense, have a judge order the production of the discovery, and then set *Touhy* up as the ultimate roadblock? In other words, it seems that the Government ultimately controls whether the Defense will ultimately have a "*Touhy* issue." Further, if a Motion to Compel is granted, it is the Government that is ordered to produce evidence – i.e. go get it and give it to the Defense. So I don't see how *Touhy* is implicated at all given that the discovery request is of the Government, and not of the agency itself.

Another thing I don't understand is that you've had access to these witnesses (since you were able to obtain the OCA unsworn declarations). You also represented at the Article 32 that all of these individuals were prepared to testify telephonically if needed. This would appear to be a clear violation of Article 46 if you are now attempting to prevent equal access to these witnesses by hiding behind *Touhy*.

Finally, if under your view, *Touhy* regulations clearly apply as part of the criminal process and this is the way that discovery/witness requests must be processed (even when compelled), how is it that you've only learned of this process a week ago? As you well know, I have been submitting discovery requests for a year and a half. I have been asking in various capacities to speak with the OCAs for 5-6 months. How can you not have informed yourself of how my discovery/deposition requests could be satisfied before now? It seems that either: a) you were not diligent in processing Defense requests, or b) *Touhy* is not actually an impediment to me getting the relevant discovery, but rather an 11th-hour roadblock conveniently erected by the Government.

I really need you to provide more clarity on the Government's position. Please do not tell me that you are "working with the relevant agencies to find an answer." The Government's position on how *Touhy* affects this case does not depend

on consultation with other organizations. I ask that you clarify exactly how you think *Touhy* applies to your discovery obligations by Monday at 5:00, so that we can be prepared to discuss this at our 802 Conference on Tuesday.

Best,
David

David E. Coombs, Esq.
Law Office of David E. Coombs
11 South Angell Street, #317
Providence, RI 02906
Toll Free: 1-800-588-4156
Local: (508) 689-4616
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Sent: Thursday, March 01, 2012 7:18 PM
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Cc: Matthew kemkes; Paul Bouchard; Joshua Tooman; Melissa Santiago; Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA; Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA; Ford, Arthur D. WO1 USA JFHQ-NCR/MDW SJA
Subject: RE: Multiple Items

David,

A. For your client's mail:

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JBM-HH, VA 22211

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B. As for your *Touhy* information request below:

1. Yes. According to DoDD 5405.2 and AR 27-40, *Touhy* appears to not apply to access to DoD/DA personnel or information for courts-martial.

David Coombs

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Sent: Friday, March 02, 2012 12:34 PM
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Subject: RE: Multiple Items

Ashden,

I look forward to a detailed response on Monday. I ask that you reply to all of the issues/questions I raised in my email.

Best,
David

David E. Coombs, Esq.
Law Office of David E. Coombs
11 South Angell Street, #317
Providence, RI 02906
Toll Free: 1-800-588-4156
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Cc: "Matthew kemkes" <matthew.kemkes@us.army.mil>, "Paul Bouchard" <paul.r.bouchard.mil@mail.mil>, "Joshua Tooman" <joshua.j.tooman.mil@mail.mil>, "Melissa Santiago" <melissa.s.santiago@us.army.mil>, "Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA" <JoDean.Morrow@jfhqncr.northcom.mil>, "Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA" <Angel.Overgaard@jfhqncr.northcom.mil>, "Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA" <Jeffrey.Whyte@jfhqncr.northcom.mil>, "Ford, Arthur D. WO1 USA JFHQ-NCR/MDW SJA" <Arthur.Ford@jfhqncr.northcom.mil>

David Coombs

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Subject: RE: Multiple Items

David,

Thank you. On Monday, I will provide you a more detailed reply to this email; however at first glance, I think you are misinterpreting or not understanding what I have previously wrote. Overall this does not prevent the defense's access to witnesses and information, it simply sets out requirements to request access under certain circumstances (as outlined in the CFRs).

v/r
Ashden

-----Original Message-----

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Sent: Friday, March 02, 2012 12:11 PM
To: Fein, Ashden CPT USA JFHQ-NCR/MDW SJA
Cc: Matthew kemkes; 'Paul Bouchard'; 'Joshua Tooman'; 'Melissa Santiago'; Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA; Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA; Ford, Arthur D.
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David Coombs

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Sent: Monday, March 05, 2012 4:59 PM
To: coombs@armycourt martialdefense.com
Cc: Matthew kemkes; Paul Bouchard; Joshua Tooman; Melissa Santiago; Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA; Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA; Ford, Arthur D. WO1 USA JFHQ-NCR/MDW SJA
Subject: RE: Multiple Items

David,

Bottom line, the United States will not withhold any evidence based on the Touhy regulations. Our interpretation of the Touhy regulations and relevant case law is that the regulations are NOT a basis to withhold evidence from the defense. The Touhy regulations simply centralize the decision making process within an agency, in order to provide information based on subpoena, judicial order, or private party requests.

Your prior requests, based on the purported authorities, were denied for multiple reasons, and then you asked for access based on the individuals being potential defense witnesses. This Touhy-issue arose when you asked for an update on the prosecution obtaining access to two individuals for you to interview outside of the judicial process- thus a private party request for an interview.

If you do not wish to wait on a Court's ruling, then you may submit a Touhy request to the entities and request access to the individuals.

It is the prosecution's intent to continue helping the defense obtain access, although the Touhy regulations do not make an exception for our assistance.

The prosecution will assist you with these requests, if you choose to go down this path concurrent with the judicial process. If the Court rules in favor of the defense on discovery or depositions dealing with outside agencies, then the prosecution will continue to coordinate this judicial process with the agencies under their Touhy regulations.

Although Touhy applies, the prosecution does not forecast any issues with subpoenas or judicial orders being executed under each entity's applicable rules. Again, Touhy is not a basis to withhold evidence, but rather a housekeeping rule to process requests and ensure centralized decision-making.

If information is withheld under Touhy regulations, it will be based on a proper authority, such as the classified information privilege.

v/r
Ashden

-----Original Message-----

From: coombs@armycourt martialdefense.com
[mailto:coombs@armycourt martialdefense.com]
Sent: Friday, March 02, 2012 12:34 PM
To: Fein, Ashden CPT USA JFHQ-NCR/MDW SJA
Cc: Matthew kemkes; Paul Bouchard; Joshua Tooman; Melissa Santiago; Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA; Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA; Ford, Arthur D. WO1 USA JFHQ-NCR/MDW SJA

David Coombs

From: David Coombs <coombs@armycourtartialdefense.com>
Sent: Monday, March 05, 2012 5:23 PM
To: 'Fein, Ashden CPT USA JFHQ-NCR/MDW SJA'
Cc: 'Matthew kemkes'; 'Paul Bouchard'; 'Joshua Tooman'; 'Melissa Santiago'; 'Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA'; 'Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA'; 'Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA'; 'Ford, Arthur D. WO1 USA JFHQ-NCR/MDW SJA'
Subject: RE: Multiple Items

Ashden,

Based upon your email, it is my understand that:

- 1) If the Court orders depositions, you do not see the need for a Touhy request from the Defense and believe the Court's order will be complied with by the OCAs;
- 2) If the Court orders the Defense requested discovery, you do not see the need for a Touhy request from the Defense and believe the Court's order will be complied with by the OCAs;
- 3) If the Court orders the Defense requested discovery, it will either be provided to the Defense or the Government will seek to not disclose the information pursuant to M.R.E. 505; and
- 4) If the Court does not order depositions, you believe that Touhy does apply and would necessitate a Touhy request from the Defense in order to be provided equal access to the requested OCAs under Article 46.

Please inform me if the above is correct. Thank you.

Best,
David

David E. Coombs, Esq.
Law Office of David E. Coombs
11 South Angell Street, #317
Providence, RI 02906
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-----Original Message-----

David Coombs

From: Fein, Ashden CPT USA JFHQ-NCR/MDW SJA <Ashden.Fein@jfhqncr.northcom.mil>
Sent: Monday, March 05, 2012 5:51 PM
To: David Coombs
Cc: Matthew kemkes; Paul Bouchard; Joshua Tooman; Melissa Santiago; Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA; Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA; Ford, Arthur D. WO1 USA JFHQ-NCR/MDW SJA
Subject: RE: Multiple Items

David,

If the Court orders any process, then the prosecution will work with the entities under their Touhy rules and will not turn to the defense to submit requests on top of the Court ordered process- the prosecution is responsible under the military justice system to obtain Court ordered evidence; however an entity can still object, but will have to state a proper basis. The prosecution has no reason to believe an entity will object, except on the basis of classified information. If there is no Court ordered process, then the defense will need to submit a Touhy request to speak with any Government employee outside of the DoD, pursuant to federal law.

It is the prosecution's intent to continue helping the defense obtain access, although the Touhy regulations seem to not make an exception for our assistance, but we will continue to endeavor to assist.

I hope this clarifies the issue.

v/r
Ashden

-----Original Message-----

From: David Coombs [mailto:coombs@armycourtmartrialdefense.com]
Sent: Monday, March 05, 2012 5:23 PM
To: Fein, Ashden CPT USA JFHQ-NCR/MDW SJA
Cc: Matthew kemkes; 'Paul Bouchard'; 'Joshua Tooman'; 'Melissa Santiago'; Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA; Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA; Ford, Arthur D.
WO1 USA JFHQ-NCR/MDW SJA
Subject: RE: Multiple Items

Ashden,

Based upon your email, it is my understand that:

- 1) If the Court orders depositions, you do not see the need for a Touhy request from the Defense and believe the Court's order will be complied with by the OCAs;
- 2) If the Court orders the Defense requested discovery, you do not see the need for a Touhy request from the Defense and believe the Court's order will be complied with by the OCAs;
- 3) If the Court orders the Defense requested discovery, it will either be provided to the Defense or the Government will seek to not disclose the information pursuant to M.R.E. 505; and

David Coombs

From: David Coombs <coombs@armycourtartialdefense.com>
Sent: Monday, March 05, 2012 6:07 PM
To: 'Fein, Ashden CPT USA JFHQ-NCR/MDW SJA'
Cc: 'Matthew kemkes'; 'Paul Bouchard'; 'Joshua Tooman'; 'Melissa Santiago'; 'Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA'; 'Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA'; 'Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA'; 'Ford, Arthur D. WO1 USA JFHQ-NCR/MDW SJA'
Subject: RE: Multiple Items

Ashden,

Thank you. That does provide clarity. If the request for depositions is denied, I would like to submit a Touhy request for Mr. Kennedy and for the OCA of Spec 3 and 15 of Charge II. Since each agency has its own specific requirements, can you provide me with the format that the DOS and the OCA for Spec 3 and 15 of Charge II would require for such a request? One potential problem with the Touhy request is that I will not know for sure the substance of the testimony expected of the relevant employee (other than what was stated in the classification determinations). This is one of the reasons that I would like to speak to these individuals.

Finally, with regards to the DOD OCAs, I plan to wait on the judge's ruling regard the depositions before attempting to speak with any of them. If the Court does not order depositions, does the Government want the Defense to go through a specific POC for each OCA (as the Government requested the Defense to do with Mr. Betz)? If so, could the Government be prepared to provide those POCs on the 16th of March?

Best,
David

- (a) Identify the employee or record;
- (b) Describe the relevance of the desired testimony or records to your proceeding and provide a copy of the pleadings underlying your request;
- (c) Identify the parties to your proceeding and any known relationships they have to the Department's mission or programs;
- (d) Show that the desired testimony or records are not reasonably available from any other source;
- (e) Show that no record could be provided and used in lieu of employee testimony;
- (f) Provide the substance of the testimony expected of the employee; and
- (g) Explain why you believe your Touhy Request complies

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coombs@armycourtartialdefense.com
www.armycourtartialdefense.com

David Coombs

From: Fein, Ashden CPT USA JFHQ-NCR/MDW SJA <Ashden.Fein@jfhqncr.northcom.mil>
Sent: Monday, March 05, 2012 6:27 PM
To: David Coombs
Cc: Matthew kemkes; Paul Bouchard; Joshua Tooman; Melissa Santiago; Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA; Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA; Ford, Arthur D. WO1 USA JFHQ-NCR/MDW SJA
Subject: RE: Multiple Items

David,

If the depositions are denied, the prosecution will assist with setting up the Touhy request, to include submitting them on behalf of the defense (this will have to occur for one of the OCAs based on the classification). As for the DoD OCAs, we will start accumulating the proper POCs for each OCA so that the defense may reach out to them. We should be able to accomplish this by 16 March, absent some major intervening issue.

v/r
Ashden

-----Original Message-----

From: David Coombs [mailto:coombs@armycourt martialdefense.com]
Sent: Monday, March 05, 2012 6:07 PM
To: Fein, Ashden CPT USA JFHQ-NCR/MDW SJA
Cc: Matthew kemkes; 'Paul Bouchard'; 'Joshua Tooman'; 'Melissa Santiago'; Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA; Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA; Ford, Arthur D. WO1 USA JFHQ-NCR/MDW SJA
Subject: RE: Multiple Items

Ashden,

Thank you. That does provide clarity. If the request for depositions is denied, I would like to submit a Touhy request for Mr. Kennedy and for the OCA of Spec 3 and 15 of Charge II. Since each agency has its own specific requirements, can you provide me with the format that the DOS and the OCA for Spec 3 and 15 of Charge II would require for such a request? One potential problem with the Touhy request is that I will not know for sure the substance of the testimony expected of the relevant employee (other than what was stated in the classification determinations). This is one of the reasons that I would like to speak to these individuals.

Finally, with regards to the DOD OCAs, I plan to wait on the judge's ruling

To: David Coombs

Cc: Matthew kemkes; Paul Bouchard; Joshua Tooman; Melissa Santiago; Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA; Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA; Ford, Arthur D. WO1 USA JFHQ-NCR/MDW SJA

Subject: Multiple Items

David,

Scheduling:

1. We made most of the changes you recommended based on time phasing.
2. The reason we have Motions to Compel a second time, is that we are planning for a second round from the defense, understanding that you have not intimidated such, but it seems likely considering the amount of information in this case and based on potential rulings of the military Judge, if favorable to the defense.
3. We are confused by your addition of the "Defense Request for Amended Section III Disclosure" for the next motions hearing. The Court already ruled on this issue, and instructed the defense to seek clarification if something is confusing- is there something that you and the other counsel do not understand on our disclosure? Please let us know so we may assist.
4. During our second 802 conference, after the defense offered to waive continued and future searching of Government records for Brady/Giglio information, the Court instructed the parties to essentially determine whether there can be a waiver of the accused's right for the prosecution to discover brady/giglio material. The Court did not state that this would be the subject of a motions hearing the next time we go on the record, as memorialized in the military judge listing the motions we are arguing in her post-arraignment 802 conference summary email. We have been and plan on working with multiple entities, including GAD and our State Bars, to determine if this can occur. As we stated during the conference, the United States does not oppose this limitation; HOWEVER we are not clear whether this waiver can occur both from a legal and ethical standpoint, and we do not know the effect it would have for IAC purposes on appeal. As we continue to research this issue, we welcome the defense's assistance to provide us their authorities on the legal, ethical, and prevention of IAC issues. Please take into account that this proposed waiver/limitation will likely include the prosecution not discovering some mitigating evidence for sentencing purposes, if any, even though the prosecution will intend to put on an aggravation case.
5. We do not agree that phases 4 and 5 should be combined. In a "normal" case that involves a spattering of classified information from one or two OCAs, we would agree. However because this case involves more than ten OCAs that are inside and outside DoD, we do not think it is realistic to combine unclassified and classified evidentiary motions. Additionally, the United States intends to offer for admission more than 20 items of digital media and more than seventy-five different pieces of documentary evidence. It is more realistic to space these two phases out and allow for adequate time for the Court to consider pre-authentication and pre-admission of the evidence and then pre-qualification of the many experts. For planning purposes, we are assuming the defense will not stipulate to admission of the evidence or qualifications of the experts- if we are incorrect in that assumption then please let us know and we will adjust our calendar and the way forward.
6. We agree that the timelines will adjust if the Court orders depositions, but we have chosen to give a proposal based on the information today and not contingencies based on Court rulings. We also predict that this schedule will shift more to the right based on additional defense motions, as in most cases- but as you know, that is not in our control.

OCA Contact Information:

Since 1 February 2012, the prosecution has been working with the different organizations to determine the best way for the defense to contact the individuals. For Mr. Betz, please contact LTC Lisa Gumbs, OSJA, CYBERCOM at lgumbs@nsa.gov. She is the POC at CYBERCOM. As for the OCA for Specifications 3 and 15 of Charge II and Ambassador Kennedy, we are still working with those organizations to determine if there is an exception to the normal process that can occur, rather than you submitting a Touhy request.

While we continue to work on the possibility of an exception under each organization's housekeeping rules, would you like us to concurrently assist you in obtaining their Touhy information?

ASUs:

BLUF-The command needs your client's to give them money and there is no way to bill him or the HCCF. However, it appears the command has one of PFC BM's check in their possession which CPT Bouchard or a member of the defense could use to obtain the money.

From the command: We won't be able to take the money from HCCF. PFC BM was sent with three checks from the JRCF, we deposited two at HCCF. We still have the third. We could have him coordinate with either his lawyer or his family to have the check cashed, give us the amount needed to purchase his uniforms and then he can instruct his family/lawyer on what to do with the remaining amount. Otherwise the only other idea would be to draft a memo for PFC BM to sign stating that he wants to purchase the uniforms and to have his lawyer release the funds to us.

Address of HCCF:

We are still working with PMO to determine if the HCCF location/address should be given out. We think this information is FOUO//LES to protect PFC BM and the facility. If that is the answer, then we will come up with a proposal to ensure he can still receive the mail.

Protective Order:

We are still working with DoJ and DA experts on the procedures for the protective order and coordinating with many of the OCAs. Hopefully by COB tomorrow, I will have an answer to your question as to whether we envision a process that has the CSO going directly with the OCAs.

V/r
Ashden

ATTACHMENT D

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The President Signs H.R. 553, The Reducing Over-Classification Act

Ben Rhodes

October 07, 2010
03:06 PM EDT

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Today, the President signed into law bipartisan legislation to decrease over-classification and promote information sharing across the federal government and with state, local, tribal, and private sector entities.

As the President has highlighted previously, protecting national security information and demonstrating our commitment to open government through the proper application of classification standards are equally important and compatible priorities. Enlisting the power of our democratic values strengthens our ability to counter terrorism, and is critical to keeping America secure and the American people informed.



President Barack Obama signs the Reducing Over-Classification Bill in the Oval Office. Rep. Jane Harman, D-Calif., stands behind the President. October 7, 2010. (Official White House Photo by Pete Souza)

The President was joined in the Oval Office by the bill's sponsor, Rep. Jane Harman, Chair

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The 9/11 Commission concluded that over-classification and inadequate information sharing contributed to the government's failure to prevent the attacks of 9/11. As Commissioner Richard Ben-Veniste testified (pdf) before Congress in 2005

The Commission found, however, that the failure to share information was the single most important reason why the United States government failed to detect and disrupt the 9/11 plot. ... Information has to flow more freely. Much more information needs to be declassified. A great deal of information should never be classified at all.

The Reducing Over-Classification Act (H.R. 553) (pdf) takes concrete action to implement these lessons. It does this by establishing procedures to promote information sharing with state, local, tribal, and private sector entities, and by providing training and incentives to promote accurate classification of information by federal employees.

Specifically, the Act requires the Department of Homeland Security to designate a Classified Information Advisory Officer to disseminate educational materials and administer training programs to assist state, local, tribal, and private sector entities; it directs the Director of National Intelligence to establish guidance to standardize formats for intelligence products; and it institutes annual training for employees with original classification authority. The legislation also directs federal Inspectors General to assess the effectiveness of agency classification policies.

Enacting this legislation is the latest of many steps in the President's aggressive campaign to reduce unwarranted secrecy; to improve information sharing and analysis across the federal government; and to build the most open administration in history. For example:

- On December 29, 2009, the President issued Executive Order 13526 to significantly improve the system for classifying, safeguarding, and declassifying national security information, including the establishment of the National Declassification Center to conduct a unified and efficient declassification review of historically important older records. The President also issued a memo to the heads of federal agencies highlighting the importance of implementing these changes promptly and effectively.
- On June 25, 2010, the Information Security Oversight Office of the National Archives and Records Administration issued a final implementing directive (pdf) pursuant to Executive Order 13526, to further enhance the effectiveness of this system.
- On August 18, 2010, the President issued an additional directive, Executive Order 13549, which establishes for the first time a Classified National Security Information Program that enhances national security by facilitating the sharing and safeguarding of classified national security information with first responders and other officials in state, local, tribal, and private sector entities.

When it passed H.R. 553, Congress recognized the Administration's significant progress on these issues. As the Senate Homeland Security and Government Affairs Committee stated in its report (pdf) on this legislation, H.R. 553 is intended to complement Executive Order 13526, and "both the Order and the Act will promote the goals of transparency, information sharing, and security."

Ben Rhodes is Deputy National Security Advisor for Strategic Communications

Related Topics: Homeland Security

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Video and Statement: Celebrating Archbishop Desmond Tutu

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West Wing Week: "A Farewell to Rahm"

PUBLIC LAW 111-258—OCT. 7, 2010

REDUCING OVER-CLASSIFICATION ACT

Public Law 111-258
111th Congress

An Act

To require the Secretary of Homeland Security to develop a strategy to prevent the over-classification of homeland security and other information and to promote the sharing of unclassified homeland security and other information, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Reducing Over-
Classification
Act.
6 USC 101 note.

SECTION 1. SHORT TITLE.

This Act may be cited as the "Reducing Over-Classification Act".

6 USC 124m
note.

SEC. 2. FINDINGS.

Congress finds the following:

(1) The National Commission on Terrorist Attacks Upon the United States (commonly known as the "9/11 Commission") concluded that security requirements nurture over-classification and excessive compartmentation of information among agencies.

(2) The 9/11 Commission and others have observed that the over-classification of information interferes with accurate, actionable, and timely information sharing, increases the cost of information security, and needlessly limits stakeholder and public access to information.

(3) Over-classification of information causes considerable confusion regarding what information may be shared with whom, and negatively affects the dissemination of information within the Federal Government and with State, local, and tribal entities, and with the private sector.

(4) Over-classification of information is antithetical to the creation and operation of the information sharing environment established under section 1016 of the Intelligence Reform and Terrorism Prevention Act of 2004 (6 U.S.C. 485).

(5) Federal departments or agencies authorized to make original classification decisions or that perform derivative classification of information are responsible for developing, implementing, and administering policies, procedures, and programs that promote compliance with applicable laws, executive orders, and other authorities pertaining to the proper use of classification markings and the policies of the National Archives and Records Administration.

50 USC 435d
note.

SEC. 3. DEFINITIONS.

In this Act:

(1) **DERIVATIVE CLASSIFICATION AND ORIGINAL CLASSIFICATION.**—The terms “derivative classification” and “original classification” have the meanings given those terms in Executive Order No. 13526.

(2) **EXECUTIVE AGENCY.**—The term “Executive agency” has the meaning given that term in section 105 of title 5, United States Code.

(3) **EXECUTIVE ORDER NO. 13526.**—The term “Executive Order No. 13526” means Executive Order No. 13526 (75 Fed. Reg. 707; relating to classified national security information) or any subsequent corresponding executive order.

SEC. 4. CLASSIFIED INFORMATION ADVISORY OFFICER.

(a) **IN GENERAL.**—Subtitle A of title II of the Homeland Security Act of 2002 (6 U.S.C. 121 et seq.) is amended by adding at the end the following:

“SEC. 210F. CLASSIFIED INFORMATION ADVISORY OFFICER.

6 USC 124m.

“(a) **REQUIREMENT TO ESTABLISH.**—The Secretary shall identify and designate within the Department a Classified Information Advisory Officer, as described in this section.

Designation.

“(b) **RESPONSIBILITIES.**—The responsibilities of the Classified Information Advisory Officer shall be as follows:

“(1) To develop and disseminate educational materials and to develop and administer training programs to assist State, local, and tribal governments (including State, local, and tribal law enforcement agencies) and private sector entities—

“(A) in developing plans and policies to respond to requests related to classified information without communicating such information to individuals who lack appropriate security clearances;

“(B) regarding the appropriate procedures for challenging classification designations of information received by personnel of such entities; and

“(C) on the means by which such personnel may apply for security clearances.

“(2) To inform the Under Secretary for Intelligence and Analysis on policies and procedures that could facilitate the sharing of classified information with such personnel, as appropriate.

“(c) **INITIAL DESIGNATION.**—Not later than 90 days after the date of the enactment of the Reducing Over-Classification Act, the Secretary shall—

Deadline

“(1) designate the initial Classified Information Advisory Officer; and

“(2) submit to the Committee on Homeland Security and Governmental Affairs of the Senate and the Committee on Homeland Security of the House of Representatives a written notification of the designation.”.

Notification.

(b) **CLERICAL AMENDMENT.**—The table of contents in section 1(b) of the Homeland Security Act of 2002 (6 U.S.C. 101 et seq.) is amended by inserting after the item relating to section 210E the following:

“Sec. 210F. Classified Information Advisory Officer”.

SEC. 5. INTELLIGENCE INFORMATION SHARING.

(a) DEVELOPMENT OF GUIDANCE FOR INTELLIGENCE PRODUCTS.—Paragraph (1) of section 102A(g) of the National Security Act of 1947 (50 U.S.C. 403–1(g)) is amended—

- (1) in subparagraph (E), by striking “and” at the end;
- (2) in subparagraph (F), by striking the period at the end and inserting a semicolon and “and”; and
- (3) by adding at the end the following:

“(G) in accordance with Executive Order No. 13526 (75 Fed. Reg. 707; relating to classified national security information) (or any subsequent corresponding executive order), and part 2001 of title 32, Code of Federal Regulations (or any subsequent corresponding regulation), establish—

“(i) guidance to standardize, in appropriate cases, the formats for classified and unclassified intelligence products created by elements of the intelligence community for purposes of promoting the sharing of intelligence products; and

“(ii) policies and procedures requiring the increased use, in appropriate cases, and including portion markings, of the classification of portions of information within one intelligence product.”

(b) CREATION OF UNCLASSIFIED INTELLIGENCE PRODUCTS AS APPROPRIATE FOR STATE, LOCAL, TRIBAL, AND PRIVATE SECTOR STAKEHOLDERS.—

(1) RESPONSIBILITIES OF SECRETARY RELATING TO INTELLIGENCE AND ANALYSIS AND INFRASTRUCTURE PROTECTION.—Paragraph (3) of section 201(d) of the Homeland Security Act of 2002 (6 U.S.C. 121(d)) is amended to read as follows:

“(3) To integrate relevant information, analysis, and vulnerability assessments (regardless of whether such information, analysis or assessments are provided by or produced by the Department) in order to—

“(A) identify priorities for protective and support measures regarding terrorist and other threats to homeland security by the Department, other agencies of the Federal Government, State, and local government agencies and authorities, the private sector, and other entities; and

“(B) prepare finished intelligence and information products in both classified and unclassified formats, as appropriate, whenever reasonably expected to be of benefit to a State, local, or tribal government (including a State, local, or tribal law enforcement agency) or a private sector entity.”

(2) ITACG DETAIL.—Section 210D(d) of the Homeland Security Act of 2002 (6 U.S.C. 124k(d)) is amended—

(A) in paragraph (5)—

(i) in subparagraph (D), by striking “and” at the end;

(ii) by redesignating subparagraph (E) as subparagraph (F); and

(iii) by inserting after subparagraph (D) the following:

“(E) make recommendations, as appropriate, to the Secretary or the Secretary’s designee, for the further dissemination of intelligence products that could likely

inform or improve the security of a State, local, or tribal government, (including a State, local, or tribal law enforcement agency) or a private sector entity; and”;

(B) in paragraph (6)(C), by striking “and” at the end;

(C) in paragraph (7), by striking the period at the end and inserting a semicolon and “and”; and

(D) by adding at the end the following:

“(8) compile an annual assessment of the ITACG Detail’s performance, including summaries of customer feedback, in preparing, disseminating, and requesting the dissemination of intelligence products intended for State, local and tribal government (including State, local, and tribal law enforcement agencies) and private sector entities; and

Assessment.

“(9) provide the assessment developed pursuant to paragraph (8) to the program manager for use in the annual reports required by subsection (c)(2).”.

(c) INTERAGENCY THREAT ASSESSMENT AND COORDINATION GROUP ANNUAL REPORT MODIFICATION.—Subsection (c) of section 210D of the Homeland Security Act of 2002 (6 U.S.C. 124k) is amended—

(1) in the matter preceding paragraph (1), by striking “, in consultation with the Information Sharing Council,”;

(2) in paragraph (1), by striking “and” at the end;

(3) in paragraph (2), by striking the period at the end and inserting a semicolon and “and”; and

(4) by adding at the end the following:

“(3) in each report required by paragraph (2) submitted after the date of the enactment of the Reducing Over-Classification Act, include an assessment of whether the detailees under subsection (d)(5) have appropriate access to all relevant information, as required by subsection (g)(2)(C).”.

Assessment

SEC. 6. PROMOTION OF ACCURATE CLASSIFICATION OF INFORMATION.

50 USC 435 note

(a) INCENTIVES FOR ACCURATE CLASSIFICATIONS.—In making cash awards under chapter 45 of title 5, United States Code, the President or the head of an Executive agency with an officer or employee who is authorized to make original classification decisions or derivative classification decisions may consider such officer’s or employee’s consistent and proper classification of information.

(b) INSPECTOR GENERAL EVALUATIONS.—

(1) REQUIREMENT FOR EVALUATIONS.—Not later than September 30, 2016, the inspector general of each department or agency of the United States with an officer or employee who is authorized to make original classifications, in consultation with the Information Security Oversight Office, shall carry out no less than two evaluations of that department or agency or a component of the department or agency—

Deadline

(A) to assess whether applicable classification policies, procedures, rules, and regulations have been adopted, followed, and effectively administered within such department, agency, or component; and

(B) to identify policies, procedures, rules, regulations, or management practices that may be contributing to persistent misclassification of material within such department, agency or component.

(2) DEADLINES FOR EVALUATIONS.—

(A) **INITIAL EVALUATIONS.**—Each first evaluation required by paragraph (1) shall be completed no later than September 30, 2013.

(B) **SECOND EVALUATIONS.**—Each second evaluation required by paragraph (1) shall review progress made pursuant to the results of the first evaluation and shall be completed no later than September 30, 2016.

(3) **REPORTS.**—

(A) **REQUIREMENT.**—Each inspector general who is required to carry out an evaluation under paragraph (1) shall submit to the appropriate entities a report on each such evaluation.

(B) **CONTENT.**—Each report submitted under subparagraph (A) shall include a description of—

(i) the policies, procedures, rules, regulations, or management practices, if any, identified by the inspector general under paragraph (1)(B); and

(ii) the recommendations, if any, of the inspector general to address any such identified policies, procedures, rules, regulations, or management practices.

(C) **COORDINATION.**—The inspectors general who are required to carry out evaluations under paragraph (1) shall coordinate with each other and with the Information Security Oversight Office to ensure that evaluations follow a consistent methodology, as appropriate, that allows for cross-agency comparisons.

(4) **APPROPRIATE ENTITIES DEFINED.**—In this subsection, the term “appropriate entities” means—

(A) the Committee on Homeland Security and Governmental Affairs and the Select Committee on Intelligence of the Senate;

(B) the Committee on Homeland Security, the Committee on Oversight and Government Reform, and the Permanent Select Committee on Intelligence of the House of Representatives;

(C) any other committee of Congress with jurisdiction over a department or agency referred to in paragraph (1);

(D) the head of a department or agency referred to in paragraph (1); and

(E) the Director of the Information Security Oversight Office.

50 USC 435d

Requirements.
Deadline.

SEC. 7. CLASSIFICATION TRAINING PROGRAM.

(a) **IN GENERAL.**—The head of each Executive agency, in accordance with Executive Order 13526, shall require annual training for each employee who has original classification authority. For employees who perform derivative classification, or are responsible for analysis, dissemination, preparation, production, receipt, publication, or otherwise communication of classified information, training shall be provided at least every two years. Such training shall—

(1) educate the employee, as appropriate, regarding—

(A) the guidance established under subparagraph (G) of section 102A(g)(1) of the National Security Act of 1947 (50 U.S.C. 403-1(g)(1)), as added by section 5(a)(3), regarding the formatting of finished intelligence products;

(B) the proper use of classification markings, including portion markings that indicate the classification of portions of information; and

(C) any incentives and penalties related to the proper classification of intelligence information; and

(2) ensure such training is a prerequisite, once completed successfully, as evidenced by an appropriate certificate or other record, for—

(A) obtaining original classification authority or derivatively classifying information; and

(B) maintaining such authority.

(b) RELATIONSHIP TO OTHER PROGRAMS.—The head of each Executive agency shall ensure that the training required by subsection (a) is conducted efficiently and in conjunction with any other required security, intelligence, or other training programs to reduce the costs and administrative burdens associated with carrying out the training required by subsection (a).

Approved October 7, 2010.

LEGISLATIVE HISTORY—H. R. 553:

SENATE REPORTS: No. 111-200 (Comm. on Homeland Security and Governmental Affairs).

CONGRESSIONAL RECORD:

Vol. 155 (2009): Feb. 3, considered and passed House.

Vol. 156 (2010): Sept. 27, considered and passed Senate, amended.

Sept. 28, House concurred in Senate amendment.

ATTACHMENT E

David Coombs

From: Almanza, Paul R LTC RES USAR USARC <paul.r.almanza@us.army.mil>
Sent: Wednesday, December 14, 2011 2:19 PM
To: Almanza, Paul; coombs@armycourt.martialdefense.com; Ashden.Fein@jfhqncr.northcom.mil
Cc: paul.r.bouchard.mil@mail.mil; Angel.Overgaard@jfhqncr.northcom.mil; mark.holzer@us.army.mil; matthew.kemkes@us.army.mil; Jeffrey.Whyte@jfhqncr.northcom.mil; Ashden.Fein@jfhqncr.northcom.mil; JoDean.Morrow@jfhqncr.northcom.mil; melissa.s.santiago@us.army.mil
Subject: Determinations and Evidence List (UNCLASSIFIED)
Attachments: 28 USC 1746 Legislative History.rtf; US v. Gunderman (67 MJ 683).rtf; Nissho-Iwai v Kline (845 F2d 1300).rtf; Hart v Hairston (343 F3d 762) 2003.rtf; Manning Article 32 Def Obj to Gov Evid Determin 121411.doc; Manning Article 32 Evidence List 121411.doc; 28 USC 1746 Legislative History.rtf; US v. Gunderman (67 MJ 683).rtf; Nissho-Iwai v Kline (845 F2d 1300).rtf; Hart v Hairston (343 F3d 762) 2003.rtf; Manning Article 32 Def Obj to Gov Evid Determin 121411.doc; Manning Article 32 Evidence List 121411.doc

Classification: UNCLASSIFIED
Counsel -

Three issues, listed below. And in addition to attaching the documents referenced in 1., below, I am also attaching my determinations regarding defense objections to government evidence and my evidence list.

1. Statements under penalty of perjury. I received legal advice from my legal advisor yesterday concerning whether a statement under penalty of perjury constitutes a "sworn statement" permitting it to be considered over defense objection if the witness is not reasonably available. The advice was that in accordance with the text of 28 U.S.C. Section 1746, a declaration under penalty of perjury is legally given "like force and effect" of a sworn statement and for purposes of consideration as an alternative to testimony at the Article 32 may be considered as a sworn statement. LTC Holzer also advised that the discussion to Article 131 (see para. 57c(3)) mentions signing a summarized transcript of Article 32 testimony under penalty of perjury, which indicates that such statements signed outside of an Article 32 hearing but associated with such an investigation can be considered. I also note that the classification review statements at issue all indicate that they are in the "course of justice" as they all indicate the persons making the statements knew they were being prepared for use in this case. As such, I consider these statements to have the same indicia of reliability as sworn statements.

Based on his advice and my review of the indicia of reliability, I intend to consider the statements made under penalty of perjury provided by RADM Kevin Donegan, Mr. Robert Betz, LtGen Robert Schmidle, VADM Robert Harward, Mr. Patrick Kennedy, RADM David Woods, and the person subscribing Bates numbers 00378148-00378175 and 00410623-00410634.

LTC Holzer provided four documents, attached, supporting his advice:

- a. The legislative history of 28 U.S.C. Section 1746.
- b. US v. Gunderman, 67 M.J. 683 (A.C.C.A. 2009)
- c. Nissho-Iwai v. Kline, 845 F.2d 1300 (5th Cir. 1988)
- d. Hart v. Hairston, 343 F.3d 762 (5th Cir. 2003).

2. Request for reconsideration of closure determination/request for media exclusion and gag order. I recognize that the defense disagrees with my determination that reasonable alternatives to closure, such as thorough voir dire of the panel members and appropriate rulings and instructions by the military judge, would ensure that should this case be referred to trial, PFC Manning would receive a fair trial. However, I do not believe that the defense has shown why

these alternatives to closure are insufficient. Additionally, with respect to the defense's reference to "high-ranking officials ... hav[ing] made improper comments concerning PFC Manning's probable guilt and appropriate punishment," in Mr. Coombs's 131621 December 2011 email, I find that thorough voir dire and appropriate rulings and instructions by the military judge will adequately address the risk of unlawful command influence. I therefore deny the defense's request for reconsideration of my closure determination. With respect to the defense's request to exclude the media from discussion of the five topics at issue and to issue a gag order preventing other witnesses from discussing those topics, those requests are denied.

3. Invocation of Article 31/Fifth Amendment rights. The recommendation I received from my legal advisor was that once witnesses invoke their Article 31 or Fifth Amendment rights, those witnesses are not reasonably available. LTC Holzer also recommended that counsel for the witnesses be contacted to determine whether there are any areas of inquiry that the witness could respond to questioning without invoking their rights. Should it be the case that counsel indicate there are no areas that the witnesses will discuss without invoking their rights, LTC Holzer recommended that the witness be called in lieu of relying on a written statement of their intent to invoke their rights. Accordingly, I intend to call both SFC Adkins and WO1 Balonek as noted below.

Thank you.

LTC Almanza

On 12/14/11, coombs@armycourtartialdefense.com wrote:

> LTC Almanza,

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> I will be available on my cell at 1500.

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> Best,

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>

> David

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> David E. Coombs, Esq.

> Law Office of David E. Coombs

> 11 South Angell Street, #317

> Providence, RI 02906

>

UNITED STATES

v.

MANNING, Bradley E., PFC

U.S. Army, xxx-xx- [REDACTED]

Headquarters and Headquarters Company, U.S.

Army Garrison, Joint Base Myer-Henderson Hall,

Fort Myer, VA 22211

**DEFENSE REPLY TO
PROSECUTION RESPONSE TO
DEFENSE MOTION TO
COMPEL DISCOVERY**

DATED: 13 March 2012

RELIEF SOUGHT

1. In accordance with the Rules for Courts-Martial (R.C.M.) 701(a)(5), 701(a)(6), 701(a)(2)(A) and 906(b)(6), Manual for Courts-Martial (M.C.M.), United States, 2008; Article 46, Uniform Code of Military Justice (UCMJ); and the Fifth and Sixth Amendments to the United States Constitution, the Defense respectfully requests that the Court compel the requested discovery.

ARGUMENT

2. The Government fundamentally misunderstands its discovery obligations in this case. It references inapposite federal case law for *Brady*, cites to the wrong rule in the Rules for Courts-Martial, and fails to follow the appropriate process for challenging discovery requests. After an overview of what the Government claims are its constitutional and other discovery obligations, the Government concludes, "in light of the facts and legal authority outlined above, the United States has produced all discoverable information that is required under RCM 703 and the Constitution." See Prosecution Response to Defense Motion to Compel Discovery, page 6. We have a very serious problem. The Government in this case does not know what it is doing.

3. The starting point for the Government's discovery obligations is R.C.M. 701. Shockingly, the Government seems to have completely overlooked R.C.M. 701. It believes instead that its discovery obligations are governed by R.C.M. 703.¹ It states in the first line of its legal argument, "Rule for Court-Martial (R.C.M.) 703(f) and the Supreme Court ruling in *Brady* outline the obligation of the United States to produce unclassified information." See Prosecution Response to Defense Motion to Compel Discovery, page 5. The Government could not be further off base.

4. R.C.M. 703 does not apply to the Government's discovery obligations; rather, it deals with the production of witnesses and evidence. As stated in an article by Lieutenant Colonel Eric Carpenter, "discovery and production rules are fairly simple—if you can distinguish one from the other." *Simplifying Discovery and Production: Using Easy Frameworks to Evaluate the 2009 Term of Cases*, THE ARMY LAWYER 31 (January 2011). He explains the difference as follows:

¹ The only reference to 701 in the Government's motion is at p. 5, where the Government states that "The rule does not govern the production of classified information." See R.C.M. 701(f).

Fundamentally, discovery rules govern how the parties will exchange information. The rules for discovery establish how each party must help the other party to develop the other party's case. Discovery deals with preparation and investigation. Discovery means finding or learning something that was previously unknown and is used to "reveal facts and develop evidence." A party can seek discovery and obtain information that might not be not admitted into evidence at trial. For example, the information might be used to develop other evidence that the party will eventually try to admit.

In contrast, production rules focus on presenting evidence or witnesses at trial. At that point, the party has been through discovery, gathered facts, and chosen which facts will be introduced as evidence at trial. The party now needs the help of compulsory process to bring those facts to the courtroom—typically through a witness or physical evidence.

When we look at the RCMs, we see language that reflects this fundamental difference between discovery and production. For example, look at the rule that deals with specific discovery requests from the defense, RCM 701(a)(2)(A). This rule states that when the defense requests a specific item, then the government must disclose that item if certain conditions are met. One of those potential conditions is that the item must be "material to the preparation of the defense." That language deals with preparation and investigation, not with whether that item will ultimately be introduced at trial.

Id. at 31-32 (footnotes omitted). The Government has completely confused the difference between "discovery" and "production." It has inexplicably been operating under the assumption that 703, the production rule, governs its discovery obligations. It is no wonder why the Government has not provided any of the requested discovery, including *Brady* discovery—it does not even know what rules govern.

5. Below, the Defense addresses the Government's fundamental misunderstanding of its *Brady* obligations, its other discovery obligations pursuant to R.C.M. 701(a)(2)(A) and the entire process of trying a classified evidence case.

A. The Government Does Not Understand its *Brady* Obligations

6. As indicated, R.C.M. 701 is the relevant rule governing pretrial discovery. In particular, R.C.M. 701(a)(6) provides the following:

701(a)(6) *Evidence favorable to the defense.* The trial counsel shall, as soon as practicable, disclose to the defense the existence of evidence known to the trial counsel which reasonably tends to:

(A) Negate the guilt of the accused of an offense charged;

(B) Reduce the degree of guilt of the accused of an offense charged; or

(C) Reduce the punishment.

7. R.C.M. 701(a)(6) is the military's version of the *Brady* rule. See, e.g., *United States v. Santos*, 59 M.J. 317, 321 (C.A.A.F. 2004) ("Regardless of whether the defense has made a request, the Government is required to disclose known evidence that 'reasonably tends to' negate or reduce the degree of guilt of the accused or reduce the punishment that the accused may receive if convicted." See R.C.M. 701(a)(6); see also *Williams*, 50 M.J. at 440 (noting that R.C.M. 701(a)(6) implements the disclosure requirements of *Brady* [])(emphasis added). The rule is not mentioned even once in the Government's response.

8. R.C.M. 701(a)(6) is much more expansive than the U.S. Supreme Court's actual decision in *Brady*. Military courts have recognized this time and again. For instance, in *United States v. Trigueros*, 69 M.J. 604 (A. Ct. Crim. App. 2010), the Army Court of Criminal Appeals very recently remarked that:

Our superior court has previously noted that R.C.M. 701, "which sets forth specific requirements with respect to evidence favorable to the defense implements . . . the Supreme Court's decision in *Brady v. Maryland* . . ." We view our superior court's guidance as requiring us to analyze nondisclosure issues under the statutory and executive order standards set forth by R.C.M. 701 and Article 46, UCMJ, which are broader than the *Brady* constitutional standard. . . . The military justice system provides for broader discovery than due process and *Brady* require.

Id. at p. 609, 610 (emphasis added); see also *United States v. Eshalomi*, 23 M.J. 12, 24 (C.M.A. 1986) (the broad discovery rights granted by Congress and the President are intended to provide "more generous discovery to be available for [the] military accused" than the minimal requirements of pretrial disclosure required by the Constitution); *United States v. Mott*, 2009 WL 4048019 at *4 (N-M. Ct. Crim. App. 2009) ("Article 46, UCMJ, and R.C.M. 701 give an accused the right to obtain favorable evidence. Discovery in a court-martial context is broader than in federal civilian criminal proceedings and is designed to eliminate pretrial 'gamesmanship.'"); *Santos*, 59 M.J. at 321 ("The military justice system provides for broader discovery than required by practice in federal civilian criminal trials. Article 46, UCMJ, mandates that 'the trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe.' The President has implemented Article 46 in Rule for Courts-Martial 701."); *Trigueros*, 69 M.J. at 610 ("The military justice system provides for broader discovery than due process and *Brady* require."); *United States v. Hart*, 29 M.J. 407, 410 (C.M.A. 1990) ("[D]iscovery available to the accused in courts-martial is broader than the discovery rights granted to most civilian defendants."); *United States v. Guthrie*, 53 M.J. 103, 105 (C.A.A.F. 2000) ("Discovery in military practice is open, broad, liberal, and generous."); *United States v. Simmons*, 38 M.J. 376, 380 (C.M.A. 1993) ("Congress intended more generous discovery to be available for military accused."); *United States v. Killebrew*, 9 M.J. 154, 159 (C.M.A. 1980)

("Military law has long been more liberal than its civilian counterpart in disclosing the government's case to the accused and in granting discovery rights."); *United States v. Adens*, 56 M.J. 724, 731 (A. Ct. Crim. App. 2002) ("The military criminal justice system contains much broader rights of discovery than is available under the Constitution or in most civilian jurisdictions.") (citations omitted).

9. The wording of the rule itself shows that it is intended to be broader than the minimum due process protections provided by the *Brady* case. See, e.g., Carpenter, *supra*, at 34 ("RCM 701(a)(6) states that the benefit of the doubt goes to the defense: the government needs to disclose the evidence if it reasonably tends to be favorable.") (emphasis in original).

10. Additionally, the trial counsel has a greater obligation than even R.C.M. 701(a)(6) would suggest. This is because Army Regulation (AR) 27-26, Rule 3.8(d) provides:

RULE 3.8 Special Responsibilities of a Trial Counsel

A trial counsel shall:

(d) make timely disclosure to the defense of all evidence or information known to the lawyer that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known to the lawyer, except when the lawyer is relieved of this responsibility by a protective order or regulation;

The Commentary to this Rule recognizes that "A trial counsel is not simply an advocate but is responsible to see that the accused is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." *Id.* Further, Rule 3.4 provides:

RULE 3.4 Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

...

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

The Commentary to this section observes:

The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of

evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like. Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the Government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed, or destroyed.

Id. See *United States v. Kinzer*, 39 M.J. 559, 562 (A.C.M.R. 1994); *Adens*, 56 M.J. at 731-32. See also Captain Elizabeth Cameron Hernandez, *The Brady Bunch: An Examination of Disclosure Obligations In the Civilian Federal and Military Justice Systems*, 67 A.F. L. REV. 187, 241 (2011) (“As evident in the broad language of Model Rule 3.8(d), a prosecutor’s duty to disclose evidence is more expansive than that required in *Brady*. Additionally, the Model Rules make no provision for whether the information is “material” to the defense; rather, it requires disclosure of “all evidence or information” which may negate the guilt or mitigate the offense of the accused.”). Thus, the Government has an obligation under Rule 701(a)(6) and AR 27-26 to turn over evidence “favorable” to the accused. The *Brady* standard in the military is not the exacting one under which the Government has been operating for almost two years.

11. In its Response to the Defense Motion to Compel Discovery, the Government fundamentally misapprehends its *Brady* obligations. It believes that the threshold of *Brady* material is one that does not exist in the military justice system. It is well-established that while *Brady* may be the starting point in discovery obligations, it is not the end point. Under the Government’s reading of *Brady*, it would only be required to disclose an exculpatory “smoking gun” in order to fulfill its *Brady* obligations. This is simply not the case.

12. Aside from a case cited by the Defense (*Williams*), the Government does not cite a single military case dealing with *Brady*. Rather it cites broad and misleading propositions of law from the United States Supreme Court. Nowhere is this more apparent than in the Government’s use of the *Cone v. Bell* case. See 556 U.S. 449, 129 S. Ct. 1769 (2009). The Government cites *Cone* for the proposition that “favorable evidence is subject to constitutionally mandated disclosure when it ‘could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.’”² See Prosecution Response to the Defense Motion to Compel Discovery, page 5. The Government does not mention that the quotation is followed by footnote 15 which reads, in its entirety:

Although the Due Process Clause of the Fourteenth Amendment, as interpreted by *Brady*, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor’s ethical or statutory obligations. See *Kyles*, 514 U.S., at 437, 115 S.Ct. 1555 (“[T]he rule in *Bagley* (and, hence, in *Brady*) requires less of the prosecution than the ABA Standards for Criminal Justice Prosecution Function and Defense Function 3–3.11(a) (3d ed.1993)”). See also ABA Model Rule of Professional Conduct 3.8(d) (2008) (“The prosecutor in a criminal case shall” “make timely disclosure to the defense of all evidence or information known to

² Even if this were the applicable standard—which it most certainly is not—the Government is citing the standard of appellate review (i.e. whether confidence in the verdict is undermined).

the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal"). As we have often observed, the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure.

Cone, 129 S. Ct. at 1783 n.15 (citations omitted). The Supreme Court itself thus recognizes that *Brady* operates as a floor and not a ceiling for the Government's disclosure obligations. As indicated, under the military justice system and under the Regulation governing the Government's ethical responsibilities, disclosure obligations in the military are much broader than the *Brady* case and its federal progeny would suggest.

13. The Government then cites *Cone* for another misleading proposition, that "evidence that is material to guilt will often be material for sentencing purposes as well; the converse is not always true." See Prosecution Response to the Defense Motion to Compel Discovery, page 6. The Defense reads this as suggesting that its requested discovery material (in particular, the damage assessments) may be relevant for sentencing, but that does not mean that they are relevant to guilt or innocence. Thus, the Government believes the damage assessments do not need to be produced because they are not *Brady* material.³ The Government has completely taken this sentence out of context. In *Cone*, the state withheld evidence of the defendant's drug use which the defense maintained was relevant to the sentence the defendant ultimately received. The Supreme Court agreed, stating:

Neither the Court of Appeals nor the District Court fully considered whether the suppressed evidence might have persuaded one or more jurors that *Cone's* drug addiction—especially if attributable to honorable service of his country in Vietnam—was sufficiently serious to justify a decision to imprison him for life rather than sentence him to death. Because the evidence suppressed at *Cone's* trial may well have been material to the jury's assessment of the proper punishment in this case, we conclude that a full review of the suppressed evidence and its effect is warranted.

Id. at 1786 (emphasis added) (citations omitted). Thus, far from supporting the Government's position, the *Cone* case undermines it. The *Cone* case recognizes that evidence may be *Brady* material if it would be important for sentencing, even though it may not have been relevant for the merits.⁴ It appears that the Government is operating under the assumption that evidence is not *Brady* material unless it deals with the merits of the case, rather than sentencing. This point

³ The Defense believes that this utter misreading of the law also explains why the Government has gone to great pains to distinguish between "could" and "should" in reference to the damage assessments. Even if one were to accept that whether the alleged leaks caused actual damage was not relevant to the merits (which the Defense does not in any way concede), the actual damage done by the leaks is most certainly material for sentencing. But by trying to distinguish between "could" and "should" and then very misleadingly citing a case saying that evidence that is material for sentencing may not be material for the merits, the Government is clearly attempting to evade its disclosure obligations.

⁴ The Defense did not distinguish any of the other cases cited by the Government simply because the Government is so wholly off-the-mark on the relevant disclosure obligations.

is also illustrated in the Government's citation to *United States v. Agurs*, 427 U.S. 97, 112 (1976), where the Government emphasizes that "the proper standard of materiality must reflect our overriding concern with the justice of the *finding of guilt*." (Government italics). By italicizing the expression "finding of guilty" the Government is reading *Brady* to mean that evidence that is favorable as to sentencing is not *Brady* material. The Government utterly fails to understand what *Brady* (either the military or federal version) means.

14. The Government has an affirmative duty to seek out *Brady* material. See *United States v. Williams*, 50 M.J. 436, 442 (C.A.A.F. 1999). The Defense, in other words, does not need to request *Brady* material in general, or specific items it believes constitute *Brady* material, in order for the Government's obligation to disclose that information to arise. See, e.g., *United States v. Agurs*, 427 U.S. 97, 107 (1976). Thus, the relevant inquiry is the following: Is the material "favorable" to the defense within the meaning of R.C.M. 701(a)(6)?⁵ If so, the material must be turned over to the Defense.⁶

15. The Government's insistence that the Defense make an acceptable showing that the information is "relevant and necessary" under R.C.M. 703 (the production rule) is completely misplaced. The Defense has no such obligation. The obligation is the other way around: the Government must disclose information which is favorable under R.C.M. 701(a)(6) to the Defense "as soon as practicable." Here, the Government has not done so.

16. The Defense strongly believes that the damage assessments and associated reports are classic *Brady* material. The Defense believes that these damage assessments will show that the alleged leaks did minimal to no damage to national security. The Defense has several good faith bases for these beliefs. First, Government officials have publicly referred to reports which indicate that the alleged leaks did not compromise sources or methods. Second (and perhaps more important), if the information were not favorable to the Defense, the Government would gladly have handed the material over to the Defense. That the Government has been fighting tooth-and-nail to withhold discovery in contravention of its obligations demonstrates that the evidence is favorable within the meaning of *Brady*.⁷ As such, the Defense strongly believes that the Government has deliberately withheld *Brady* material, impacting the accused's right to a fair trial.

B. The Government Does Not Understand the Discovery Process Outside of *Brady*

17. Separate and apart from the *Brady* issue, properly understood, R.C.M. 701(a)(2)(A) allows for the Defense to inspect documents and reports. In other words, the obligations under R.C.M. 701(a)(2) are in addition to the obligations found under the military rule which embodies *Brady*. R.C.M. 701(a)(2)(A) reads:

After service of charges, upon request of the defense, the Government shall permit the defense to inspect:

⁵ As qualified by the Government's ethical responsibilities under Regulation.

⁶ Claims of privilege are discussed under Section C.

⁷ Even if such evidence were not *Brady* material, it is still subject to disclosure under R.C.M. 701(a)(2)(A).

(A) Any books, papers, documents, photographs, tangible objects, buildings, or places, or copies of portions thereof, which are within the possession, custody, or control of military authorities, and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial, or were obtained from or belong to the accused.

Id. (emphasis added). Under this rule, the Government has an obligation to allow the Defense to inspect, *inter alia*, documents or tangible objects within the possession, custody or control of military authorities.⁸ The only limitation is that these items must be “material to the preparation of the defense.” This is not, in any way, an exacting standard.

18. Specific discovery requests must be turned over if the requested information or items would be relevant or helpful in any way to the defense, even if that information will not ultimately be admissible at trial. The requested items, in fact, do not need to be favorable; even unfavorable items may be material to the preparation of a defense. *See Adens*, 56 M.J. at 734-35.

19. The case law reaffirms that “material” under R.C.M. 701(a)(2)(A) is not a difficult standard to satisfy. In *U.S. v. Cano*, 2004 WL 5863050 at *3 (A. Crim. Ct. App. 2004), our superior court discussed the content of the “materiality” standard under R.C.M. 701(a)(2)(A):

In reviewing AE V in camera, the military judge said that he examined the records and AE III contained “everything . . . [he] thought was even remotely potentially helpful to the defense.” That would be a fair trial standard, but our examination finds a great deal more that should have been disclosed as “material to the preparation of the defense.” We caution trial judges who review such bodies of evidence in camera to do so with an eye and mind-set of a defense counsel at the beginning of case preparation. That is, not solely with a view to the presentation of evidence at trial, but to actually preparing to defend a client, so that the mandate of Article 46, UCMJ, is satisfied.

See also U.S. v. Roberts, 59 M.J. 323, 326 (C.A.A.F. 2004) (“The defense had a right to this information because it was relevant to SA M’s credibility and was therefore material to the

⁸ All of the specific Defense requests ask for information which is in the “possession, custody, or control of military authorities” within the meaning of *Williams*, 50 M.J. 436 (C.A.A.F. 1999). The Government has not once in the past year and a half objected to any of the Defense’s discovery requests on the basis that the information sought is not in the “possession, custody, or control of military authorities.” Rather, the Government has simply said that the requests were not specific enough or that it did not believe the material was relevant or necessary under R.C.M. 703. In the event that the Government now switches its “game plan” to deny discovery, it should be estopped from arguing that any of the Defense’s requested information is not in the “possession, custody, or control of military authorities.” *See, e.g., United States v. Bryan*, 868 F.2d 1032, 1036 (9th Cir. 1989) (“The prosecutor will be deemed to have knowledge of and access to anything in the possession, custody, or control of any federal agency participating in the same investigation of the defendant.”); *United States v. Simmons*, 38 M.J. 376, 381 (C.M.A. 1993) (holding that trial counsel must exercise due diligence in discovering the results of exams and tests which are in possession of CID); *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (“[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police.”).

preparation of the defense for purposes of the Government's obligation to disclose under R.C.M. 701(a)(2)(A).”(emphasis added); *Adens*, 56 M.J. at 733 (“We respectfully disagree with our sister court’s narrow interpretation that the term ‘material to the preparation of the defense’ in R.C.M. 701(a)(2)(A) and (B) is limited to exculpatory evidence under the *Brady* line of cases and hold that our sister court’s decision in *Trimper* should no longer be followed in Army courts-martial. There is no language in R.C.M. 701, or in its analysis, indicating any intent by the President to limit disclosure under Article 46, UCMJ, to constitutionally required exculpatory matters. As noted above, R.C.M. 701 is specifically intended to provide ‘for broader discovery than is required in Federal practice’ (R.C.M. 701 Analysis, at A21–32), and unquestionably is intended to implement an independent statutory right to discovery under Article 46, UCMJ.”); *United States v. Webb*, 66 M.J. 89, 92 (C.A.A.F. 2008) (“[U]pon request of the defense, the trial counsel must permit the defense to inspect any documents within the custody, or control of military authorities that are ‘material to the preparation of the defense.’ R.C.M. 701(a)(2)(A). Thus, an accused’s right to discovery is not limited to evidence that would be known to be admissible at trial. It includes materials that would assist the defense in formulating a defense strategy.”).

20. Thus, under R.C.M. 701(a)(2)(A), the Government must turn over specifically requested items that are material to the preparation of the Defense. The Defense does not need to show that the items are “relevant and necessary” under R.C.M. 703, as the Government believes.

21. If the Government does not think that the requested items are “material to the preparation of the defense,” the Government cannot, under any circumstances, unilaterally withhold discovery. See *United States v. Gonzalez*, 62 M.J. 303, 306 (C.A.A.F. 2006) (“When a defendant makes a specific request for discoverable information, it is error if the Government does not provide the requested information.”). The appropriate course of action if the Government maintains that the requested material does not meet the R.C.M. 701(a)(2)(A) standard is to follow the procedures outlined in R.C.M. 701(g)(2) for an in camera determination by the Military Judge. The Rule provides, in pertinent part:

Upon a sufficient showing the military judge may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the military judge may permit the party to make such showing, in whole or in part, in writing to be inspected only by the military judge.

22. In other words, if the Government believes that a discovery request is inappropriate, it must file a motion with the military judge requesting an in camera review. It cannot continue to state that the Defense has not adequately demonstrated materiality within the meaning of R.C.M. 701(a)(2)(A) and thereby refuse the discovery request.⁹ Alternatively, if the material is classified, the Government must proceed under M.R.E. 505, discussed below. This comports

⁹ For example, the Government does not believe that the hard drives of soldiers within PFC Manning’s unit are “relevant and necessary” (the wrong standard). Perhaps this also means that the Government does not believe that this physical evidence is material to the preparation of the Defense. If so, the Government must motion the Military Judge under R.C.M. 701(g)(2) for an appropriate determination (or under R.C.M. 505, if the material is classified). It cannot continue, as it has for almost two years, to refuse to provide the discovery to the Defense because it does not feel that the Defense should get it.

with logic and common sense: How can an adversarial party be the unilateral arbiter of what is “material to the defense” within the meaning of R.C.M. 701(a)(2)(A)? The Government has not requested an in camera review because, of course, it is not even reading the correct discovery rule.

C. The Government Does Not Understand that the Potentially Classified Nature of the Information Does Not Mean that it Does Not Need to Comply With its Discovery Obligations

23. The Government believes that the classified nature of some of the discovery sought somehow means that the material is immunized from discovery. This is simply not the case. If the Government does not wish to turn over either: a) R.C.M. 701(a)(6)/*Brady* material (properly understood); or b) items specifically requested pursuant to R.C.M. 701(a)(2)(A) that is claims are classified, then it must follow the proper procedures under M.R.E. 505. The Government has not done so. Instead it has withheld discovery on the erroneous belief that M.R.E. 505 means that the information is not discoverable. See Prosecution Response to Defense Motion to Compel Discovery, p. 7 (“[T]he fact that these hard drives were collected from a classified facility, namely the SCIF, confirms that the rules of production under Military Rule of Evidence (M.R.E.) 505 should govern whether these images are discoverable.”).

24. The Government has not claimed a privilege under M.R.E. 505(f), nor has the Government provided the requested information to the Court under M.R.E. 505(i). Instead, the Government has simply withheld the requested information under its belief that “production” and not “discovery” rules control. This is not only improper, it is an incorrect view of the law. Moreover, that the Government does not know what procedure to follow in a classified evidence case completely undermines the Defense’s confidence in the ability of the Government to fulfill its discovery obligations.

D. The Government’s Response Continues to Obscure the Truth

25. The Defense is tired of the games the Government continues to play. Even if the Defense could somehow overlook the elephant in the room—that the Government does not understand military discovery—the Government’s response illustrates perfectly the gamesmanship that military courts do not countenance. The Defense provides some examples below. These are not intended to be comprehensive, but to show how disingenuous the Government has been in this proceeding.

- i) The Government at page 1 states “on 16 November 2011, Defense did not specifically request files completed with the assistance of the Office of the Director of National Intelligence.” The Government’s statement gives the impression that the Defense never specifically requested files completed with the assistance of the Office of the Director of National Intelligence. Such a statement, as the Government fully knows, is inaccurate. The Defense, a month earlier, on 13 October 2011, specifically requested “any and all documentation relating to any review or damage

assessment conducted by ODNI [the Office of the Director of National Intelligence] or in cooperation with any other government agency.” See Defense’s 13 October 2011 Discovery Request at 1.c.vi. Likewise, when the Government states on page 2 of its response that the “Defense did not specifically request any alleged information completed by the WikiLeaks Task Force (WTF)” on 1 December 2011, this too is misleading. The Defense specifically requested information from the WTF on 13 October 2011 “any report, damage assessment or recommendation by the Wikileaks Task Force or any other CIA member concerning the alleged leaks in this case.” See Defense’s 13 October 2011 Discovery Request at 1.c.iii. Additionally, the Defense requested on 8 December 2010 “any and all documentation related to the Central Intelligence Agency (CIA) investigation of Wikileaks announced by CIA Director Leon Panetta...” The announcement by former CIA Director Panetta of the agency’s review was the creation of the Wikileaks Task Force. Thus the Defense has repeatedly requested all of this information.

- ii) The Government asks at page 8 that the “United States respectfully requests the Court deny Defense’s request for damage assessments, if any should exist.” The Government then states that it will not produce the “alleged damage assessment by the WTF” or the “alleged damage assessment by the IRTF.” The Defense knows that these assessments exist. The Government should not be permitted to continue its game of smoke and mirrors by referring to an “alleged” damage report. It obviously knows that such reports exist; accordingly, it is not accurate to refer to them as “alleged” and to continue to refuse to acknowledge their existence.
- iii) The Government has indicated at page 11 that the DOS “has not completed a damage assessment” and that ONCIX “has not completed a damage assessment.” The Defense believes that the Government may be playing fast-and-loose with the term “completed.” The Defense requested any and all reports and documents related to a damage assessment. That neither of these organizations has “completed” a damage assessment does not mean that the requested information does not exist.
- iv) The Government states at page 12-14 that “the United States is unaware of ‘any forensic results and investigative reports’ from within [agency] that contributed to any law enforcement investigation. “Unaware” is not a standard; either these exist or do not exist. Notably, the Government does not indicate that it actually looked for the Defense-requested materials.
- v) The Government says at page 8 that it intends to produce information related to the accused from an open FBI investigation “that is discoverable under Brady.” As discussed above, the Government is operating under the wrong *Brady* standard. Moreover, the Government has an obligation to produce these files as part of the R.C.M. 701(a)(2)(A) request. Finally, why has the Government not already secured the appropriate approvals?
- vi) With respect to almost every discovery request, the Government complains that the Defense has failed to state “with specificity” what it was requesting. Short of

referring to a report/document by name, the Defense could not possibly state any of the discovery requests with more specificity. The Defense has asked for information, documents, reports, etc. created by certain named agencies related to the accused's alleged disclosure of documents. The Government knows full well "exactly what [the Defense] desires." Prosecution Response to Defense Motion to Compel Discovery, page 12-14. It just does not want to provide this information. Moreover, if the Government needs more specificity (i.e. does not understand what the Defense is seeking), how can it claim that the requested discovery is not "relevant and necessary"? If the Government cannot pinpoint what the Defense is looking for, then obviously it cannot claim that this unknown item is not "relevant and necessary." The two are wholly inconsistent.

26. The Government's responses to both the Protective Order and this Motion to Compel are disheartening. At the Article 32 hearing, I asked the Investigating Officer, "Is this the best that military justice can do?" I echo that sentiment again now.

CONCLUSION

27. Based on the above, and the original motion submitted by the Defense (including the ex parte supplement) the Defense requests that the Court order the Government to obtain the requested information and provide this information to the Defense.

Respectfully submitted,



DAVID EDWARD COOMBS
Civilian Defense Counsel

SWORN STATEMENT

For use of this form, see AR 190-45; the proponent agency is PMG.

PRIVACY ACT STATEMENT

AUTHORITY: Title 10, USC Section 301; Title 5, USC Section 2951; E.O. 9397 Social Security Number (SSN).

PRINCIPAL PURPOSE: To document potential criminal activity involving the U.S. Army, and to allow Army officials to maintain discipline, law and order through investigation of complaints and incidents.

ROUTINE USES: Information provided may be further disclosed to federal, state, local, and foreign government law enforcement agencies, prosecution, courts, child protective services, victims, witnesses, the Department of Veterans Affairs, and the Office of Personnel Management. Information provided may be used for determinations regarding judicial or non-judicial punishment, other administrative disciplinary actions, security clearances, recruitment, retention, placement, and other personnel actions.

DISCLOSURE: Disclosure of your SSN and other information is voluntary.

1. LOCATION Fort Myer, Virginia	2. DATE (YYYYMMDD) 2012/02/17	3. TIME 1000	4. FILE NUMBER
5. LAST NAME, FIRST NAME, MIDDLE NAME Papakie, Brian Robert	6. SSN 210-54-4511	7. GRADE/STATUS E-8/MSgt	
8. ORGANIZATION OR ADDRESS HQMC PSL Corrections 755 S. Courthouse Rd. Suite 2000 Arlington, VA 22204-2478			

9. I, MSgt Brian Robert Papakie, WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH:

On 18 January 2011, Two video recordings of PFC Bradley E Manning were documented in the Quantico Pre-trial Confinement Facility. The two videos were recorded at the same time. The Camera was stopped and started again with an approximate time lapse of 1 minute in an attempt to better the angle of the individual speaking with PFC Manning. This was done by the camera man walking around the opposite hallway to the other end of the Alpha Row of cells. The recordings were taken due to PFC Manning becoming irrational in his cell by throwing his body around and appeared to attempt self bodily harm. Under the Brig Commanding Officer's direction, PFC Manning was placed on Suicide Risk status. During the course of obtaining PFC Manning's clothing, a video recording was conducted to document the occurrence. One video shows myself retrieving PFC Manning's gear and the other video is a conclusion of the incident with GySgt Blenis talking with PFC Manning in an attempt to calm the situation. The recordings were turned over to the Marine Corps Staff Judge Advocates Office on Marine Corps Base Quantico and no other videos of PFC Manning were taken during his confinement at the Quantico Pre-trial Confinement Facility.-End Of Statement-

10. EXHIBIT	11. INITIALS OF PERSON MAKING STATEMENT BRP	PAGE 1 OF <u>2</u> PAGES
ADDITIONAL PAGES MUST CONTAIN THE HEADING "STATEMENT OF _____ TAKEN AT _____ DATED _____"		
THE BOTTOM OF EACH ADDITIONAL PAGE MUST BEAR THE INITIALS OF THE PERSON MAKING THE STATEMENT, AND PAGE NUMBER MUST BE INDICATED.		

DA FORM 2823, NOV 2006

PREVIOUS EDITIONS ARE OBSOLETE

APD PE v1.01ES

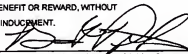
APPELLATE EXHIBIT XXV11 (27)
Page 1 of Page(s) 2

STATEMENT OF MSgt Brian. Robert Papakie TAKEN AT Ft Myer DATED 2012/02/17

9. STATEMENT (Continued)

AFFIDAVIT


I, MSgt Brian Robert Papakie, HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1, AND ENDS ON PAGE 2. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL INDUCEMENT.


(Signature of Person Making Statement)

WITNESSES:

Subscribed and sworn to before me, a person authorized by law to administer oaths, this 17 day of Feb, 2012

at Ft Myer


(Signature of Person Administering Oath)

ORGANIZATION OR ADDRESS

John Heberland
(Typed Name of Person Administering Oath)

ORGANIZATION OR ADDRESS

10 U.S.C. 1044a
(Authority To Administer Oaths)

INITIALS OF PERSON MAKING STATEMENT

PAGE 2 OF 2 PAGES

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First, MI) MANNING, Bradley E.		2. SSN [REDACTED]	3. GRADE OR RANK PFC	4. PAY GRADE E-3
5. UNIT OR ORGANIZATION Headquarters and Headquarters Company, U.S. Army Garrison, Joint Base Myer-Henderson Hall Fort Myer, Virginia 22211			6. CURRENT SERVICE a. INITIAL DATE [REDACTED] b. TERM 4 years	
7. PAY PER MONTH a. BASIC \$1,950.00		b. SEA/FOREIGN DUTY None	c. TOTAL \$1,950.00	8. NATURE OF RESTRAINT OF ACCUSED Pre-Trial Confinement
				9. DATE(S) IMPOSED 29 May 10 -

II. CHARGES AND SPECIFICATIONS

10. ~~ADDITIONAL~~ ^{AF 237M-12} CHARGE I: VIOLATION OF THE UCMJ, ARTICLE 104.

THE SPECIFICATION: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, between on or about 1 November 2009 and on or about 27 May 2010, without proper authority, knowingly give intelligence to the enemy, through indirect means.

~~ADDITIONAL~~ ^{AF 237M-12} CHARGE II: VIOLATION OF THE UCMJ, ARTICLE 134.

SPECIFICATION 1: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, between on or about 1 November 2009 and on or about 27 May 2010, wrongfully and wantonly cause to be published on the internet intelligence belonging to the United States government, having knowledge that intelligence published on the internet is accessible to the enemy, such conduct being prejudicial to good order and discipline in the armed forces and being of a nature to bring discredit upon the armed forces.

(See Continuation Sheet)

III. PREFERRED

11a. NAME OF ACCUSER (Last, First, MI) Leiker, Cameron A.	b. GRADE O-5	c. ORGANIZATION OF ACCUSER HQ CMD BN, USA
d. SIGNATURE OF ACCUSER [REDACTED]	e. DATE 1 MAR 2011	

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 1st day of March, 2011, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.

ASHDEN FEIN

Typed Name of Officer

MDW, OSJA

Organization of Officer

Trial Counsel

Official Capacity to Administer Oath

(See R.C.M. 307(b) - must be a commissioned officer)

O-3
[REDACTED]

12.

On Wed 02 March 2011 0-1545 HRS, 2011, the accused was informed of the charges against him/her and of the name(s) of The accuser(s) known to me (See R.C.M. 308 (a)). (See R.C.M. 308 if notification cannot be made.)

CAMERON A. LEIKER

Typed Name of Immediate Commander

HQ CMD BN, USA

Organization of Immediate Commander

O-5

Grade

Signature

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13.

The sworn charges were received at 1056 hours, Tue, 02 March 2011 at

HQ CMD BN, USA

Designation of Command or

Officer Exercising Summary Court-Martial Jurisdiction (See R.C.M. 403)

FOR THE

CAMERON A. LEIKER

Typed Name of Officer

Commanding

Official Capacity of Officer Signing

O-5

Grade

Signature

V. REFERRAL: SERVICE OF CHARGES

14a DESIGNATION OF COMMAND OF CONVENING AUTHORITY
Headquarters, U.S. Army Military
District of Washington

b. PLACE

Fort McNair, DC

c. DATE

20120203

Referred for trial to the General Court-martial convened by Court-Martial Convening Order

Number 1, this headquarters, dated

2 February 2011

, subject to the following instructions:² None.

By

Command

Of

MG MICHAEL S. LINNINGTON

Command or Order

Chief, Military Justice

Official Capacity of Officer Signing

Typed Name of Officer

Grade

15.

On _____, 2011, I (caused to be) served a copy hereof on (each of) the above named accused.

Typed Name of Trial Counsel

Grade or Rank of Trial Counsel

Signature

FOOTNOTES: 1 — When an appropriate commander signs personally, inapplicable words are stricken.

2 — See R.C.M. 601(e) concerning instructions. If none, so state.

Item 10 (Cont'd):

SPECIFICATION 2: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, between on or about 15 February 2010 and on or about 5 April 2010, having unauthorized possession of information relating to the national defense, to wit: a video file named "12 JUL 07 CZ ENGAGEMENT ZONE 30 GC Anyone.avi", with reason to believe such information could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicate, deliver, transmit, or cause to be communicated, delivered, or transmitted, the said information, to a person not entitled to receive it, in violation of 18 U.S. Code Section 793(e), such conduct being prejudicial to good order and discipline in the armed forces and being of a nature to bring discredit upon the armed forces.

SPECIFICATION 3: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, between on or about 22 March 2010 and on or about 26 March 2010, having unauthorized possession of information relating to the national defense, to wit: more than one classified memorandum produced by a United States government intelligence agency, with reason to believe such information could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicate, deliver, transmit, or cause to be communicated, delivered, or transmitted, the said information, to a person not entitled to receive it, in violation of 18 U.S. Code Section 793(e), such conduct being prejudicial to good order and discipline in the armed forces and being of a nature to bring discredit upon the armed forces.

SPECIFICATION 4: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, between on or about 31 December 2009 and on or about 5 January 2010, steal, purloin, or knowingly convert to his use or the use of another, a record or thing of value of the United States or of a department or agency thereof, to wit: the Combined Information Data Network Exchange Iraq database containing more than 380,000 records belonging to the United States government, of a value of more than \$1,000, in violation of 18 U.S. Code Section 641, such conduct being prejudicial to good order and discipline in the armed forces and being of a nature to bring discredit upon the armed forces.

SPECIFICATION 5: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, between on or about 31 December 2009 and on or about 9 February 2010, having unauthorized possession of information relating to the national defense, to wit: more than twenty classified records from the Combined Information Data Network Exchange Iraq database, with reason to believe such information could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicate, deliver, transmit, or cause to be communicated, delivered, or transmitted, the said information, to a person not entitled to receive it, in violation of 18 U.S. Code Section 793(e), such conduct being prejudicial to good order and discipline in the armed forces and being of a nature to bring discredit upon the armed forces.

SPECIFICATION 6: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, between on or about 31 December 2009 and on or about 8 January 2010, steal, purloin, or knowingly convert to his use or the use of another, a record or thing of value of the United States or of a department or agency thereof, to wit: the Combined Information Data Network Exchange Afghanistan database containing more than 90,000 records belonging to the United States government, of a value of more than \$1,000, in violation of 18 U.S. Code Section 641, such conduct being prejudicial to good order and discipline in the armed forces and being of a nature to bring discredit upon the armed forces.

SPECIFICATION 7: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, between on or about 31 December 2009 and on or about 9 February 2010, having unauthorized possession of information relating to the national defense, to wit: more than twenty classified records from the Combined Information Data Network Exchange Afghanistan database, with reason to believe such information could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicate, deliver, transmit, or cause to be communicated, delivered, or transmitted, the said information, to a person not entitled to receive it, in violation of 18 U.S. Code Section 793(e), such conduct being prejudicial to good order and discipline in the armed forces and being of a nature to bring discredit upon the armed forces.

SPECIFICATION 8: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, on or about 8 March 2010, steal, purloin, or knowingly convert to his use or the use of another, a record or thing of value of the United States or of a department or agency thereof, to wit: a United States Southern Command database containing more than 700 records belonging to the United States government, of a value of more than \$1,000, in violation of 18 U.S. Code Section 641, such conduct being prejudicial to good order and discipline in the armed forces and being of a nature to bring discredit upon the armed forces.

SPECIFICATION 9: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, between on or about 8 March 2010 and on or about 27 May 2010, having unauthorized possession of information relating to the national defense, to wit: more than three classified records from a United States Southern Command database, with reason to believe such information could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicate, deliver, transmit, or cause to be communicated, delivered, or transmitted, the said information, to a person not entitled to receive it, in violation of 18 U.S. Code Section 793(e), such conduct being prejudicial to good order and discipline in the armed forces and being of a nature to bring discredit upon the armed forces.

SPECIFICATION 10: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, between on or about 11 April 2010 and on or about 27 May 2010, having unauthorized possession of information relating to the national defense, to wit: more than five classified records relating to a military operation in Farah Province, Afghanistan occurring on or about 4 May 2009, with reason to believe such information could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicate, deliver, transmit, or cause to be communicated, delivered, or transmitted, the said information, to a person not entitled to receive it, in violation of 18 U.S. Code Section 793(e), such conduct being prejudicial to good order and discipline in the armed forces and being of a nature to bring discredit upon the armed forces.

SPECIFICATION 11: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, between on or about 1 November 2009 and on or about 8 January 2010, having unauthorized possession of information relating to the national defense, to wit: a file named "BE22 PAX.zip" containing a video named "BE22 PAX.wmv", with reason to believe such information could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicate, deliver, transmit, or cause to be communicated, delivered, or transmitted, the said information, to a person not entitled to receive it, in violation of 18 U.S. Code Section 793(e), such conduct being prejudicial to good order and discipline in the armed forces and being of a nature to bring discredit upon the armed forces.

SPECIFICATION 12: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, between on or about 28 March 2010 and on or about 4 May 2010, steal, purloin, or knowingly convert to his use or the use of another, a record or thing of value of the United States or of a department or agency thereof, to wit: the Department of State Net-Centric Diplomacy database containing more than 250,000 records belonging to the United States government, of a value of more than \$1,000, in violation of 18 U.S. Code Section 641, such conduct being prejudicial to good order and discipline in the armed forces and being of a nature to bring discredit upon the armed forces.

SPECIFICATION 13: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, between on or about 28 March 2010 and on or about 27 May 2010, having knowingly exceeded authorized access on a Secret Internet Protocol Router Network computer, and by means of such conduct having obtained information that has been determined by the United States government pursuant to an Executive Order or statute to require protection against unauthorized disclosure for reasons of national defense or foreign relations, to wit: more than seventy-five classified United States Department of State cables, willfully communicate, deliver, transmit, or cause to be communicated, delivered, or transmitted the said information, to a person not entitled to receive it, with reason to believe that such information so obtained could be used to the injury of the United States, or to the advantage of any foreign nation, in violation of 18 U.S. Code Section 1030(a)(1), such conduct being prejudicial to good order and discipline in the armed forces and being of a nature to bring discredit upon the armed forces.

SPECIFICATION 14: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, between on or about 15 February 2010 and on or about 18 February 2010, having knowingly exceeded authorized access on a Secret Internet Protocol Router Network computer, and by means of such conduct having obtained information that has been determined by the United States government pursuant to an Executive Order or statute to require protection against unauthorized disclosure for reasons of national defense or foreign relations, to wit: a classified Department of State cable titled "Reykjavik-13", willfully communicate, deliver, transmit, or cause to be communicated, delivered, or transmitted the said information, to a person not entitled to receive it, with reason to believe that such information so obtained could be used to the injury of the United States, or to the advantage of any foreign nation, in violation of 18 U.S. Code Section 1030(a)(1), such conduct being prejudicial to good order and discipline in the armed forces and being of a nature to bring discredit upon the armed forces.

SPECIFICATION 15: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, between on or about 15 February 2010 and on or about 15 March 2010, having unauthorized possession of information relating to the national defense, to wit: a classified record produced by a United States Army intelligence organization, dated 18 March 2008, with reason to believe such information could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicate, deliver, transmit, or cause to be communicated, delivered, or transmitted, the said information, to a person not entitled to receive it, in violation of 18 U.S. Code Section 793(e), such conduct being prejudicial to good order and discipline in the armed forces and being of a nature to bring discredit upon the armed forces.

SPECIFICATION 16: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, between on or about 11 May 2010 and on or about 27 May 2010, steal, purloin, or knowingly convert to his use or the use of another, a record or thing of value of the United States or of a department or agency thereof, to wit: the United States Forces - Iraq Microsoft Outlook / SharePoint Exchange Server global address list belonging to the United States government, of a value of more than \$1,000, in violation of 18 U.S. Code Section 641, such conduct being prejudicial to good order and discipline in the armed forces and being of a nature to bring discredit upon the armed forces.

AF 235M12
~~ADDITIONAL~~ CHARGE III: VIOLATION OF THE UCMJ, ARTICLE 92.

SPECIFICATION 1: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, between on or about 1 November 2009 and on or about 8 March 2010, violate a lawful general regulation, to wit: paragraph 4-5(a)(4), Army Regulation 25-2, dated 24 October 2007, by attempting to bypass network or information system security mechanisms.

SPECIFICATION 2: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, between on or about 11 February 2010 and on or about 3 April 2010, violate a lawful general regulation, to wit: paragraph 4-5(a)(3), Army Regulation 25-2, dated 24 October 2007, by adding unauthorized software to a Secret Internet Protocol Router Network computer.

SPECIFICATION 3: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, on or about 4 May 2010, violate a lawful general regulation, to wit: paragraph 4-5(a)(3), Army Regulation 25-2, dated 24 October 2007, by adding unauthorized software to a Secret Internet Protocol Router Network computer.

SPECIFICATION 4: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, between on or about 11 May 2010 and on or about 27 May 2010, violate a lawful general regulation, to wit: paragraph 4-5(a)(3), Army Regulation 25-2, dated 24 October 2007, by using an information system in a manner other than its intended purpose.

SPECIFICATION 5: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, on divers occasions between on or about 1 November 2009 and on or about 27 May 2010, violate a lawful general regulation, to wit: paragraph 7-4, Army Regulation 380-5, dated 29 September 2000, by wrongfully storing classified information.

IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES)

v.)

MANNING, Bradley E., PFC)
U.S. Army, xxx-xx-)
HHC, U.S. Army Garrison)
Joint Base Myer-Henderson Hall)
Fort Myer, Virginia 22211)

**RULING: DEFENSE MOTION
FOR BILL OF PARTICULARS**

DATED: 15 March 2012

Defense has filed a motion for the Government to provide a Bill of Particulars pursuant to RCM 906(b)(6) and the Fifth, Sixth, and Eights Amendments to the U.S. Constitution. Defense argues that a bill of particulars is necessary for him to understand the charges against him so he may adequately prepare his defense and not be subjected to unfair surprise at trial.

After considering the pleadings, evidence presented, and argument of counsel, the Court finds and concludes the following:

Factual Findings:

1. PFC Manning is charged with:

- a. 5 specifications of violating a lawful general regulation; [Charge III, Specifications 1-5]
- b. 1 specification of aiding the enemy; [Charge I, the Specification]
- c. 1 specification of disorders and neglects to the prejudice of good order and discipline and service discrediting; [Charge II, Specification 1]
- d. 8 specifications of communicating classified information (18 U.S.C. 793(e)); [Charge II, Specifications 2,3,5,7,9,10,11, and 15]
- e. 5 specifications of stealing or knowingly converting Government property (18 U.S.C. 641); [Charge II, Specification 4, 6, 8, 12, and 16]
- f. 2 specifications of knowingly exceeding authorized access to a Government computer (18 U.S.C. 1030(a)(1)); [Charge II, Specifications 13 and 14]

2. Defense seeks the following information in the Bill of Particulars:

a. Violation of a Lawful General Regulation

1. **Specification 1** - What is the alleged conduct the Government believes was an attempt to bypass network or information security mechanisms?
2. **Specifications 2 and 3** - What is the unauthorized software alleged to have been added to the Secret Internet Protocol Router Network Computer?

3. **Specifications 2 and 3** – Which computer is the unauthorized software alleged to have been added to the Secret Internet Protocol Router Network Computer?

4. **Specifications 2 and 3** – How is the Government alleging the software was added to the Secret Internet Protocol Router Network Computer?

b. Aiding the Enemy

1. Who is the enemy?
2. How did PFC Manning knowingly give intelligence to the enemy?
3. What is the indirect means allegedly used in order to aid the enemy?
4. What "intelligence" is the Government alleging PFC Manning gave to the enemy?

c. Disorders and Neglects to the Prejudice of Good Order and Discipline and Service Discrediting:

1. Who is the enemy?
2. In what manner did PFC Manning wrongfully and wantonly cause intelligence to be published on the internet?

d. Communicating Classified Information (18 U.S.C. 793(e));

1. **Specification 3** – Government identify the exact number and specific records it believes supports this specification charged as "more than one classified memorandum produced by a U.S. Government intelligence agency".

2. **Specification 5** - Government identify the exact number and specific records it believes supports this specification charged as "more than twenty classified records from the Combined Information Data Network Exchange Iraq database".

3. **Specification 7** - Government identify the exact number and specific records it believes supports this specification charged as "more than twenty classified records from the Combined Information Data Network Exchange Iraq database".

4. **Specification 9** - Government identify the exact number and specific records it believes supports this specification charged as "more than three classified records from a United States Southern Command database".

5. **Specification 10** - Government identify the exact number and specific records it believes supports this specification charged as "more than five classified records relating to a military operation in Farah Province, Afghanistan occurring on or about 4 May 2009".

6. **Specification 13** - Government identify the exact number and specific records it believes supports this specification charged as "more than seventy-five classified Department of State cables".

e. Stealing, Purloining, or Knowingly Converting Government Property (18 U.S.C. 641);

1. What theory of culpability does the Government rely on – "stole", "purloined" or "converted"?

2. If the Government relies on all 3 theories, does each theory of culpability apply equally to every charged item?

f. Knowingly Exceeding Authorized Access to a Government Computer (18 U.S.C. 1030(a)(1));

1. **Specification 13** - How did PFC Manning "knowingly exceed authorized access on a Secret Internet Protocol Router Network computer?"

2. **Specification 14** - How did PFC Manning "knowingly exceed authorized access on a Secret Internet Protocol Router Network computer?"

3. The Government answered all of the questions posed in the defense bill of particulars except the following:

a. Knowingly Exceeding Authorized Access to a Government Computer (18 U.S.C. 1030(a)(1))

Specification 13 - How did PFC Manning "knowingly exceed authorized access on a Secret Internet Protocol Router Network computer?"

Specification 14 - How did PFC Manning "knowingly exceed authorized access on a Secret Internet Protocol Router Network computer?"

b. Violation of a Lawful General Regulation

Specifications 2 and 3 - How is the Government alleging the software was added to the Secret Internet Protocol Router Network Computer?

c. Stealing, Purloining, or Knowingly Converting Government Property (18 U.S.C. 641); Specifications 4, 6, 8, 12, and 16 of Charge II

1. What theory of culpability does the Government rely on - "stole", "purloined" or "converted"

2. If the Government relies on all 3 theories, does each theory of culpability apply equally to every charged item?

The Law:

The discussion to RCM 906(b)(6) provides that the purposes of a bill for particulars are to:

a. inform the accused of the nature of the charge(s) with sufficient precision to enable him to prepare for trial;

b. avoid or minimize the danger or surprise at the time of trial; and

c. enable the accused to plead acquittal or conviction in bar of another prosecution when the specification itself is too vague and indefinite for such purpose.

A bill of particulars should not be used to conduct discovery of the Government's theory of a case, to force detailed disclosure of acts underlying a charge, or to restrict the Government's proof at trial.

Analysis:

1. The Government responses to the Defense Request for Bill of Particulars are sufficient to satisfy the purpose of a Bill of Particulars.


2. **Specifications 13 and 14 of Charge II:** The question posed by the defense in the bill of particulars - "How did PFC Manning "knowingly exceed authorized access on a Secret Internet Protocol Router Network computer?" is one that forces the government to reveal detailed disclosures of the acts underlying the charge. The specifications as charged sufficiently inform the accused of the nature of the offense with sufficient precision enabling him to prepare for trial, to avoid or minimize surprise at trial, and to enable the accused to plead acquittal or conviction in bar of another prosecution. Both specifications advise the accused of when and where the charged exceeded authorized access occurred. Both specifications identify the specific computer and information involved. 18 USC 1030(e)(6) defines the term "Exceed authorized access" to mean to access a computer with authorization and to use such access to obtain or alter information in the computer such that the accessor is not entitled so to obtain or alter. This definition and other definitions in the statute provide the defense sufficient notice to prepare for trial.

3. **Specifications 2 and 3 of Charge III** - How is the Government alleging the software was added to the Secret Internet Protocol Router Network Computer? This question also requires the government to reveal detailed disclosures underlying both specifications. In specifications 2 and 3 of Charge III, the accused is charged with violating Army Regulation 25-2, paragraph 4-5(a)(3), dated 24 October 2007. In both specifications, the Government followed the model specification in the Manual for Courts-Martial in drafting the charge. This model specification provides for the government to allege how that lawful regulation was violated. In both specifications the government alleges the regulation was violated by the accused in that he added unauthorized software to a Secret Internet Protocol Router Network Computer. The specification provides the defense sufficient notice to prepare for trial.

4. **Specifications 4, 6, 8, 12, and 16 of Charge II** - These specifications are charged in the disjunctive in that PFC Manning "stole", "purloined", or "converted". The Government will provide the defense with particulars on which one or all of the three theories the Government will rely upon for specifications 4, 6, 8, 12, and 16. The 2nd question posed by the defense - "If the Government relies on all 3 theories, does each theory of culpability apply equally to every charged item?" is beyond the scope of a bill of particulars and seeks detailed information regarding the Government theory of the case.

RULING: Defense Motion for Bill of Particulars is Granted in Part and Denied in Part.

ORDERED, this the 15th day of March 2012.


DENISE R. LIND
COL, JA
Chief Judge, 1st Judicial Circuit

IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES OF AMERICA

v.

Manning, Bradley E.
PFC, U.S. Army,
HHC, U.S. Army Garrison,
Joint Base Myer-Henderson Hall
Fort Myer, Virginia 22211

Ruling

Defense Request to
File Ex Parte Supplement

15 March 2012

Defense moves this Court to consider an *ex parte* supplement to its Motion to Compel Discovery. The Government opposes. After considering the pleadings, evidence presented, and argument of counsel, the Court finds and concludes the following:

Factual Findings.

1. On 14 February 2012, the defense submitted motions to the Court and the Government, to include an *ex parte* supplement to its Motion to Compel Discovery.
2. On 15 February 2012, the Court, via email, requested the Defense to provide authority for the Court to consider the *ex parte supplement*. Also via email on 15 February 2012, the Defense provided the following authority that is also contained in the *ex parte* supplement.

The Defense, in unusual situations is entitled to an ex parte hearing to justify a motion for appropriate relief. United States v. Garries, 22 MJ 288, 291 (C.M.A. 1986) (recognizing the inherent authority in the military judge to permit an ex parte proceeding in the unusual circumstance where it is necessary to ensure a fair trial); United States v. Kaspers, 47 MJ 176 (C.A.A.F. 1997) (holding that a military judge has broad discretion to protect the rights of the military accused to include conducting an ex parte hearing). In the instant case, the Defense is not requesting an ex parte hearing. Instead, the Defense simply desires to present the Court with an ex parte supplement to its motion to compel discovery.

Due to the Government's refusal to provide the requested discovery, the Defense is placed in the position of having to disclose, to a partisan opponent, why it believes certain evidence is relevant and should be produced for trial. If the Defense is required to disclose its theory of relevance, the Government will receive an advance notice of the defense's theory and the opportunity to prepare to rebut and counter the requested discovery. The Government simply has to refuse to provide requested discovery in order to force the Defense to stand in open court and explain how each request is relevant and necessary. In meeting this challenge, the Defense is forced to explain why the requested discovery is needed, how the requested discovery is relevant to a fact in issue, and why the requested

discovery is necessary to the Defense. In doing so, the Defense must balance how much of its trial strategy it will disclose to justify the production of the requested discovery. This mandated disclosure of the Defense's case theory provides an unfair advantage to the Government.

In order to avoid this unfair advantage, the Defense believes that this is one of those unusual situations where an *ex parte* hearing would be appropriate. United States v. Garries, 22 MJ 288, 291 (C.M.A. 1986); United States v. Kaspers, 47 MJ 176 (C.A.A.F. 1997).

3. On 23 February 2012, the Defense filed its *ex parte* submission under seal as AE IX. The Court asked the Government if it objected to the *ex parte* submission. The Government advised the Court it did not object. At the arraignment, the Government learned that it had not received emails from the Court and from the Defense sent prior to arraignment.
4. After arraignment, the Government learned it had experienced email server problems and had not received emails from the Defense or the Court between 14 February and 23 February 2012.
5. On 24 February 2012, the Government received the emails that it had not received from the defense and the Court between 14 and 23 February 2012. The same day the Government received the above email, the prosecution emailed the Court and requested the opportunity to object. Also on 24 February 2012, the Defense sent the Court emails from the Government dated 15 and 16 February 2012 indicating they knew the Defense was filing an Ex Parte supplement. The Government renewed their request for reconsideration at the telephonic RCM 802 conference held on 6 March 2012.

The Law:

1. There is no express authority in RCM 701 (Discovery) for the Court to consider *ex parte* filings by the Defense when determining whether evidence is relevant, material, or favorable to the defense. RCM 701(g)(2) (Protective and Modifying Orders) does authorize the Court to allow *ex parte* showings by either party when moving the Court to restrict or limit discovery. There is also no express authority in RCM 703 (Production of Witnesses and Evidence) for the Court to consider *ex parte* filings by the defense. RCM 703(f)(3) states, "any defense request for the production of evidence . . . shall include a description of each item sufficient to show its relevance and necessity, a statement where it can be obtained, and, if known, the name, address, and telephone number of the custodian of the evidence."
2. The Court of Appeals for the Armed Forces in United States v. Garries, 22 M.J. 288, 291 (CMA 1986) and United States v. Kaspers, 47 M.J. 176 (CAAF 1997) recognized, that although an accused has no right to an *ex parte* hearing, military courts have inherent authority to grant the accused an *ex parte* hearing to demonstrate relevance and necessity for an expert witness under RCM 703(d) if the circumstances are unusual.
3. This case involves an *ex parte* supplement rather than an *ex parte* hearing and the *ex parte* supplement is in furtherance of a motion to compel discovery rather than a motion to compel an

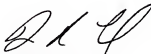
expert witness. Thus, it is an open question whether the Court has inherent authority to consider an *ex parte* supplement from the Defense in furtherance of a motion to compel discovery under RCM 701 or a motion to produce evidence under RCM 703.

Analysis:

1. Although the Government was aware the Defense intended to file an *ex parte* submission in support of its Motion to Compel Discovery before 23 February 2012, when it informed the Court it had no objection to the *ex parte* submission, the Government had not received the 15 February 2012 email from the Defense setting forth authority for the filing. Under these circumstances, the Court will allow the Government to respond and will reconsider its ruling.
2. Assuming the Court does have inherent authority to consider an *ex parte* filing by the Defense in support of a motion to compel discovery, the Court has examined the Defense's *ex parte* submission to determine whether it demonstrates unusual circumstances. The Court finds none.
3. The parties disagree on whether the motion to compel discovery involves discovery under RCM 701 (requiring the Court to make findings of relevance, materiality, and whether potentially discoverable information is favorable to the defense and material to guilt or punishment) or production of evidence under RCM 703 (requiring the Court to make findings of relevance and necessity). In either case, the position of the parties for such initial determinations should be made on the record.
4. This case involves classified information. Should the Court determine that any of the information or evidence in the motion to Compel is discoverable by the Defense, the Government may invoke the privilege for classified information in MRE 505 and move the Court to conduct an *in camera* review. Should that occur, the Defense may renew its request for the Court to consider its *ex parte* supplement when conducting *in camera* review.

RULING: The Government motion to reconsider is **GRANTED**. The Defense Motion for the Court to consider the *ex parte* supplement is **DENIED**.

ORDERED this 15th day of March 2012.


DENISE R. LIND
COL, JA
Chief Judge, 1st Judicial Circuit

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U.S. Army, XXX-XX- [REDACTED]

Headquarters and Headquarters Company, U.S.
Army Garrison, Joint Base Myer-Henderson Hall,
Fort Myer, VA 22211

**DEFENSE MOTION
TO DISMISS ALL CHARGES
WITH PREJUDICE**

DATED: 15 March 2012

1. In accordance with the Rules for Courts-Martial (R.C.M.) 701(g)(3)(D), the Defense moves to dismiss all charges in this case with prejudice.¹

BURDEN OF PERSUASION AND BURDEN OF PROOF

2. As the moving party, the Defense has the burden of persuasion. R.C.M. 905(c)(2). The burden of proof is by a preponderance of the evidence. R.C.M. 905(c)(1).

WITNESSES/EVIDENCE

3. The Defense respectfully requests this Court to consider the Defense's Motion to Compel Discovery, the Prosecution Response to the Defense's Motion to Compel Discovery, and the Defense's Reply to the Prosecution Response to the Defense's Motion to Compel Discovery.

LEGAL AUTHORITY AND ARGUMENT

A. The Government has Abandoned Wholesale Its Discovery Obligations

4. As the Government is quick to point out, this case is one of the largest and most complex cases in United States military history. It involves hundreds of thousands of pages of classified documents. It involves twenty-two specifications, including one of "Aiding the Enemy." The accused is facing life in prison. All of this and the Government does not understand its basic discovery obligations.

5. For nearly two years, the Government has been representing that it has been diligently searching high and low for *Brady* material. But it does not know what *Brady* material is. It believes that *Brady* is the standard set by the United States Supreme Court, when it is not. The

¹ As the Defense only just became aware of the Government's fatal misunderstanding of the relevant discovery rules on March 8, 2012, the Defense would like to reserve the right to supplement this Motion as necessary.

Brady principle is reflected in military practice in R.C.M. 701(a)(6) and in Army Regulation 27-26, which governs trial counsel's ethical responsibilities. As military courts have recognized over and over, military rules and ethical obligations mandate much broader *Brady* disclosure than Supreme Court's actual 50-year old decision in *Brady v. Maryland*.

6. How could the Government not know that the military has adopted R.C.M. 701(a)(6), along with AR 27-26, as the *Brady* standard? How could the Government have been operating under the wrong standard for almost the past two years? There are no words to justify such an abject failure to understand the military discovery process.

7. The damage assessments, if they say what the Defense believes they say, are classic *Brady* material that has been under the Government's nose this whole time. That the Government does not see this as *Brady* material demonstrates how big of a problem we have. How many other things has the Government reviewed and discounted over nearly the past two years as not constituting *Brady* material that *was actually Brady material*? Since the Government used the incorrect standard the whole time, there is undoubtedly *Brady* material "out there" that the Government has missed in its reviews.

8. In addition to deliberately withholding *Brady* material, the Government deliberately withheld discovery under R.C.M. 701(a)(2)(A) because it thought that R.C.M. 703 was the correct discovery rule. The Defense has been asking for myriad specific items within the control, custody and possession of military authorities for nearly two years. These items are "material to the preparation of the defense" within the meaning of R.C.M. 701(a)(2)(A). The standard for "materiality" is not a high one. Information or items are material within the meaning of this rule if they would be helpful to the defense in developing its case and formulating its strategy. In not providing the specifically requested discovery, the Government has committed another willful discovery violation, separate and apart from *Brady*.

9. As the Defense discussed in detail in its Reply, the Government failed to acknowledge the existence of R.C.M. 701(a)(6) or 701(a)(2)(A) in its motion. Instead, it focused on R.C.M. 703 (a rule governing production of witnesses and evidence at trial) and the federal *Brady* standard. The Defense cannot fathom how four individual trial counsels detailed to this case could not understand what their discovery obligations are. Either the discovery violations are willful or they are grossly negligent. Either way, the Government's abdication of its basic discovery responsibilities is unconscionable and irreparably prejudicial, mandating that all charges should be dismissed with prejudice.

B. No Remedy Short of Dismissal Can Remedy the Government's Flagrant Discovery Violations

10. The Defense respectfully requests that this Court dismiss all the charges with prejudice. In so asking, the Defense acknowledges that dismissal is a drastic remedy, to be exercised with great caution. However, R.C.M. 701(g)(3)(D) does authorize a Court to grant such a dismissal in extraordinary circumstances. The Rule provides that "[i]f at any time during the court-martial it is brought to the attention of the military judge that a party has failed to comply with this rule, the

military judge may take one or more of the following actions: ... (D) Enter such other order as is just under the circumstances." The Defense submits that a dismissal with prejudice is the only order that that would be "just" under these very unique circumstances. A "[d]ismissal of charges with prejudice ... is an appropriate remedy where the error cannot be rendered harmless." *U.S. v. Lewis*, 63 M.J. 405, 416 (C.A.A.F. 2006) (dismissing all charges with prejudice due to the prosecutor's use of unlawful command influence over the military judge).

11. Federal courts have explicitly recognized that dismissal of charges with prejudice may be an appropriate remedy for a discovery violation. See *United States v. Struckman*, 611 F.3d 560, 577 (9th Cir. 2010) ("Nonetheless, our circuit has recognized that dismissal with prejudice may be an appropriate remedy for a *Brady* or *Giglio* violation using a court's supervisory powers where prejudice to the defendant results and the prosecutorial misconduct is flagrant. We review for an abuse of discretion the district court's decision whether to dismiss the indictment to cure prejudice resulting from such misconduct.") (citations omitted); *United States v. Miranda*, 526 F.2d 1319, 1325 n.4 (2d Cir. 1975) (sanctions which may be imposed against the Government for failure to disclose material available to the defense include "the exclusion or suppression of other evidence concerning the subject matter of the undisclosed material, the grant of a new trial, or, in exceptional circumstances, dismissal of the indictment or the direction of a judgment of acquittal.") (citations omitted); *United States v. Chapman*, 524 F.3d 1073, 1086 (9th Cir. 2008) (although the appropriate remedy for a *Brady* violation will usually be a new trial, "a district court may dismiss the indictment when the prosecution's actions rise ... to the level of flagrant prosecutorial misconduct.").

12. Military courts have implicitly recognized the power of the trial court to dismiss charges with prejudice for discovery violations. In *Vigil v. Bower*, 1996 WL 233211 (A.F. Ct. Crim. App. 1996), the trial judge ordered new trial for the accused where the prosecution was "extremely negligent" in withholding evidence. The accused petitioned for extraordinary relief on the basis that the charges should have been dismissed with prejudice instead. The Air Force Court of Criminal Appeals denied the petitioner's requested relief, stating that:

[T]he military judge took prompt and decisive action when she learned, after trial, of the alleged discovery violations. The petitioner takes issue with her conclusion about the government's actions. However, the fact that the petitioner—or even another judge—might have reached a different conclusion does not give this Court reason to direct a different result.

Id. at *2. The "different conclusion" that the court was referring to was the conclusion that charges be dismissed with prejudice, thereby acknowledging that this remedy is at the disposal of the military judge. Thus, it is within the sound discretion of the court to dismiss all charges with prejudice in this case. See also *United States v. Fletcher*, 62 M.J. 175, 178 (C.A.A.F. 2005) (court recognized that "[w]hile prosecutorial misconduct does not automatically require a new trial or the dismissal of the charges against the accused, relief will be granted if the trial counsel's misconduct 'actually impacted on a substantial right of an accused.'" (quoting *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996)).

13. We know now that the Government has been playing by the wrong “rules of the game” since the beginning of the case. We know that there is *Brady* material out there, but that the Government does not know what *Brady* material is. We know that there are reports in the control, custody and possession of military authorities, but that the Government does not realize that it has to give them to the Defense. We know that the Government was literally on the wrong page of the Rules for Court Martial when it denied the Defense’s discovery requests for nearly two years.

14. No remedy short of dismissal can fix these problems. If the Court orders the Government to re-conduct discovery applying the correct R.C.M. rules and *Brady* standard, the proceeding will be delayed another two years. The Government has represented that it has diligently conducted searches for *Brady* material and in response to Defense discovery requests since May 2010, when charges were preferred. In one session, trial counsel indicated that he had searched for files within the Department of Agriculture. ***All these searches will need to be conducted again—this time, using the correct rules.*** There is no way around it. And there is no conceivable way that these searches can be conducted in a timely manner given how long the original search took. PFC Manning has already been in pretrial confinement for a total of 656 days, with a large portion of that time in solitary confinement, in violation of PFC Manning’s Article 13 rights. Any additional delay in this case to re-conduct *Brady* searches from scratch would amount to a *per se* violation of PFC Manning’s right to a speedy trial.²

15. We cannot pretend that this did not happen. We cannot pretend that the Government did, in fact, know what it was doing this whole time. It did not. Even if the Government undertook to provide the specifically requested items at this point, such a “solution” is not a solution at all. First, the Defense was already supposed to have this discovery by now so that it could integrate this material, if necessary, into its case. This material may have resulted in other leads and theories that the Defense could have explored.³ Turning the specifically requested items over at such a late date has already prejudiced the Defense’s ability to adequately prepare for trial. Second, and more importantly, even if the Government were to immediately provide⁴ all the specifically requested items, the Government will still not have complied with its *Brady* obligations. After such flagrant discovery violations, the Government cannot be allowed to circumvent R.C.M. 701(a)(6) simply by providing specifically requested discovery under R.C.M. 701(a)(2)(A).

16. Moreover, the Defense does not know what evidence, *Brady* or otherwise, was destroyed or lost owing to the Government’s discovery violations. Evidence that may have existed two years ago may not be in existence today. Had the Government done its job correctly the first time, this material would have been provided to the Defense. The Government will undoubtedly argue that this contention is speculative—that we do not know what information has been lost or destroyed over nearly the past two years. And that is exactly the Defense’s point. We don’t know what we

² The Defense maintains that PFC Manning has *already* been deprived of his constitutional right to a speedy trial.

³ For instance, even if the Defense immediately receives an EnCase copy of the requested hard drives, its forensic experts will need several months to review the material.

⁴ We know that the Government, even if ordered, will not immediately provide the requested discovery as it has indicated in its Supplement to the Case Management Order that it requires 45-60 days to coordinate and determine if it will claim privilege over these items under R.C.M. 505.

don't know. But, the reason we don't know is because of the Government's egregious misconduct.

17. The Defense has not located any cases with facts directly analogous to the instant case—this is likely because no other trial counsel in reported history has so completely missed-the-mark on its discovery obligations. Normally, in cases involving discovery violations, trial counsel has withheld one or two particular items of discovery from the defense, which the defense then asserts post-trial was prejudicial to a substantial right of the accused. See, e.g., *United States v. Adens*, 56 M.J. 724 (A. Ct. Crim. App. 2002). To the Defense's knowledge, there is no case where the Government ***just did not understand how basic discovery works***.

18. With that said, there is precedent for a court to dismiss charges where the prosecution has committed willful, egregious or grossly negligent discovery violations. In *United States v. Koubriti*, 336 F. Supp. 2d 676 (E.D. Mich. 2004), the first case prosecuted and tried in the aftermath of September 11th, the defendant alleged that the government had not fully met its discovery obligations under *Brady* and *Giglio* and that it had engaged in a pattern of misconduct. After the defendants were convicted of charges of, *inter alia*, conspiracy to provide material resources to terrorists, the defense discovered that "at least one document [] was intentionally not disclosed but unquestionably should have been." *Id.* at 678. After being made aware of this issue, the court ordered a wholesale review of the government's files, a review that took well over six months.⁵ The review revealed a pattern of prosecutorial discovery violations:

As thoroughly detailed in the Government's filing, at critical junctures and on critical issues essential to a fair determination by the jury of the issues tried in this case, the prosecution failed in its obligation to turn over to the defense, or to the Court, many documents and other information, both classified and non-classified, which were clearly and materially exculpatory of the Defendants as to the charges against them. Further, as the Government's filing also makes abundantly clear, the prosecution materially misled the Court, the jury and the defense as to the nature, character and complexion of critical evidence that provided important foundations for the prosecution's case.

As the Government's filing also makes clear, these failures by the prosecution were not sporadic or isolated. Rather, they were of such a magnitude, and were so prevalent and pervasive as to constitute a pattern of conduct, that when all of the withheld evidence is viewed collectively, it is an inescapable conclusion that the Defendants' due process, confrontation and fair trial rights were violated

⁵ The court indicated at p. 678:

It is a fair statement that at the inception of this review no one, least of all the Court, could have anticipated the nature and scope of the issues—not to mention the sheer number of documents—that would ultimately be involved in this investigation. (Just one complicating factor, for example, was the necessity for the Court to review many classified documents and for the Court to seek security clearance for its staff and defense counsel, a time consuming process.) Certainly, no one could have imagined last winter that it would be almost autumn before the review was completed and a resolution at hand.

and that the jury's verdict was infected to the point that the Court believes there is at least a reasonable probability that the jury's verdict would have been different had constitutional standards been met.

Id. at 680-81.

19. The judge then stated "one might well ask why and how this happened." *Id.* at 861. The Court offered the following comments:

However, it is sufficient to say here that two things are obvious to the Court from both its review of the Government's filing, as well as its own independent review of all the documents and evidence presented to it. First, the prosecution early on in the case developed and became invested in a view of the case and the Defendants' culpability and role as to the terrorism charges, and then simply ignored or avoided any evidence or information which contradicted or undermined that view. In doing so, the prosecution abandoned any objectivity or impartiality that any professional prosecutor must bring to his work. It is an axiom that a prosecutor must maintain sufficient distance from his case such that he may pursue and weigh all of the evidence, no matter where it may lead, and then let the facts guide him. That simply did not happen here.

More broadly, when viewed against the backdrop of the September 11 attacks upon our Nation and the public emotion and anxiety that has ensued, the prosecution's understandable sense of mission and its zeal to obtain a conviction overcame not only its professional judgment, but its broader obligations to the justice system and the rule of law.

Id. Accordingly, the government in that case moved to dismiss the conspiracy charges. The court granted the motion, stating that "the Government's decision could not have been an easy one and, no doubt, is one that will come in for criticism and second-guessing from some quarters. However, it is the right decision." *Id.* at 679.

20. Like the *Koubriti* case, this case is one that is high-profile and has attracted a great deal of domestic and international scrutiny. No doubt, the Government in this case feels compelled to convict the accused and make an example out of him. But, as the court in *Koubriti* points out, this does not mean that the Government can ignore its "broader obligations to the justice system and the rule of law." *See id.* at 861. In this case, it has done just that.

21. In *United States v. Chapman*, 524 F.3d 1073 (9th Cir. 2008), the Ninth Circuit affirmed the district court's decision to dismiss the indictment due to reckless violations of the government's discovery obligations in that case. The Ninth Circuit stated:

We have never suggested, however, that "flagrant misbehavior" does not embrace reckless disregard for the prosecution's constitutional obligations. Here, although the case involved hundreds of thousands of pages of discovery, the AUSA failed to keep a log indicating disclosed and nondisclosed materials.

The AUSA repeatedly represented to the court that he had fully complied with *Brady* and *Giglio*, when he knew full well that he could not verify these claims. When the district court finally asked the AUSA to produce verification of the required disclosures, he attempted to paper over his mistake, offering "in an abundance of caution" to make new copies "rather than find the record of what we turned over." Only when the court insisted on proof of disclosure did the AUSA acknowledge that no record of compliance even existed. Finally, the dates on many of the subsequently disclosed documents post-date the beginning of trial, so the government eventually had to concede that it had failed to disclose material documents relevant to impeachment of witnesses who had already testified. In this case, the failure to produce documents and to record what had or had not been disclosed, along with the affirmative misrepresentations to the court of full compliance, support the district court's finding of "flagrant" prosecutorial misconduct even if the documents themselves were not intentionally withheld from the defense. We note as particularly relevant the fact that the government received several indications, both before and during trial, that there were problems with its discovery production and yet it did nothing to ensure it had provided full disclosure until the trial court insisted it produce verification of such after numerous complaints from the defense.

Id. at 1085. The court expressed particular concern with the government's position on appeal. On appeal, the government had tried to argue that the withheld material was not, in fact, *Brady* material. The court was disheartened by the government's tactics on appeal, stating that "[the government] still has failed to grasp the severity of the prosecutorial misconduct involved here, as well as the importance of its constitutionally imposed discovery obligations. Accordingly, although dismissal of the indictment was the most severe sanction available to the district court, it was not an abuse of discretion." *Id.* at 1088.

22. There are several other cases where courts dismissed charges in order to remedy egregious discovery violations. In *United States v. Lyons*, 352 F. Supp. 2d 1231 (M.D. Fla. 2004), the court dismissed with prejudice the charges against the defendant because of the prejudice caused by the Government's numerous and flagrant *Brady* and *Giglio* violations. The court noted that although dismissal was an unusual remedy, it was required in this case because "the Government [] perpetuated an unjust deprivation of [defendant's] liberty throughout [the] case . . . despite obvious concerns about the Government's investigative and prosecutorial methods, despite actual notice of *Brady* and *Giglio* problems, and with unconscionable delay and prejudice to [the defendant] as well as the judicial process." *Id.* at 1251. In another case, *United States v. Dollar*, the trial court dismissed the conspiracy charges with prejudice given that the "defense counsel ha[d] been unrelenting in their effort to obtain *Brady* materials" and "[t]he United States' general response ha[d] been to disclose as little as possible, and as late as possible." 25 F. Supp. 2d 1320, 1332 (N.D. Ala. 1998). The court recognized that "[i]n its determined effort to convict the defendants, the United States ha[d] trampled on their constitutional right to *Brady* materials." *Id.* The words could not be more apt if spoken about the Government in this case.

23. There is no military authority directly on point. Again, this is because there likely has not been such a flagrant abdication of discovery responsibilities by trial counsel. However, military appellate case law reveals that our courts take the issue of discovery violations very seriously and recognize the inherent authority of the trial judge to fashion appropriate remedies. See *United States v. Trigueros*, 69 M.J. 604, 608 (A. Ct. Crim. App. 2010) (military judge fashioned a remedy that precluded the government from presenting any victim impact evidence or any aggravation evidence in its sentencing case in chief).

24. In *United States v. Adens*, 56 M.J. 724 (A. Ct. Crim. App. 2002), the Army Court of Criminal Appeals set aside the findings of guilty and the sentence in a case where the prosecutor withheld discovery from the defense. The defense had specifically requested certain physical discovery under R.C.M. 702(a)(2)(A); the government, despite having this evidence in its possession, did not provide the requested discovery because it wanted to gain the maximum tactical advantage from this evidence and use it on rebuttal. *Id.* at 733-43. On appeal, the government conceded that this violated R.C.M. 701(a)(2)(A), but argued that no prejudice ensued. The appellate court disagreed. Importantly, it found that equal opportunity to obtain evidence is a "substantial right of the accused" within the meaning of Article 59(a), independent of the due process rights provided under *Brady*. It held that when a trial counsel fails to disclose information pursuant to a specific request or when prosecutorial misconduct is present, the evidence is considered material unless the government can show that failure to disclose was harmless. *Id.* at 733. While the trial judge attempted to fashion a remedy (i.e. the government would not be able to present "any evidence" concerning the withheld materials), she did not go far enough. *Id.* at 734. In particular, the trial judge "failed to instruct the members to disregard the testimony about [the evidence] by [the special agent] on redirect examination." *Id.* The court thus set aside the findings of guilt and the sentence, stating:

Professional advocacy may be aggressive, but it does not include making personal attacks on one's adversary. As a result of the personal animosity between the principal litigators, trial counsel lost his focus and forgot that "[a]s a representative of a sovereign, a prosecutor's duty is not to win the case, but to ensure that justice is done." "The purpose of a criminal trial is truth finding within constitutional, codal, Manual, and ethical rules." Counsel must always be mindful that the Rules of Professional Conduct applicable to Army courts-martial provide that a lawyer shall not "unlawfully obstruct another party's access to evidence ... **having potential evidentiary value.**" AR 27-26, Rule 3.4 (Fairness to Opposing Party and Counsel) (emphasis added); The comment to Rule 3.4 explains:

The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

Considering the purposes behind the broad military discovery rule and the intent of the rules of professional responsibility, the successful trial counsel will

engage in full and open discovery at all times and will scrupulously avoid gamesmanship and trial by ambush, which have no place in Army courts-martial.

Id. at 735 (citations omitted)(emphasis in original).

25. In *United States v. Jackson*, 59 M.J. 330 (C.A.A.F. 2004), the Court of Appeal for the Armed Forces set aside the findings and sentence in a case where the government committed a discovery violation under R.C.M. 701(a)(2)(B). In that case, the defense had an ongoing discovery request for information related to quality control at the laboratory that tested the accused's specimen in a prosecution for methamphetamine. The court concluded that the failure to turn the report over to the accused deprived the defense of information that could have been considered by the members as critical on a pivotal issue in the case—the reliability of the laboratory's report that Appellant's specimen produced a positive result. *Id.* at 335-36. See also *United States v. Webb*, 66 M.J. 89 (C.A.A.F. 2008) (military judge did not abuse discretion in ordering new trial where government did not disclose impeaching evidence concerning witness who was the assigned observer of accused's provision of urine sample for drug testing).

26. The findings and sentence were also set aside in *United States v. Stewart*, 62 M.J. 668 (A.F. Ct. Crim. App. 2006) owing to the government's discovery violations. *Stewart* involved a prosecution where the alleged victim claimed that she had been drugged and raped. The trial counsel requested, *inter alia*, all of the victim's medical records and any evidence that might tend to negate the guilt of the accused (i.e. *Brady* material). The defense was told that it was provided with the "relevant portions" of the medical records. *Id.* at 669. After a discovery dispute over the relevant medical records, the judge reviewed the records *in camera* and determined that about 24 pages (20% of the total) would be released to the defense. *Id.* at 670. At trial, the trial counsel referred to documents that had not been released to the defense, at which time the defense learned of other important evidence (in particular, that the victim had taken several medications that could explain her symptoms on the night of the alleged rape). The defense moved for a mistrial. The military judge did not grant a mistrial, but instead suggested a number of options to alleviate the impact of the tardy disclosure. The accused was convicted and sentenced. On appeal, the court concluded that "[t]he pages withheld by the government and the military judge contained evidence that could undermine every part of the government's case." *Id.* at 671. The court continued:

We are sympathetic to the difficulties experienced by trial counsel in dealing with sensitive medical information. DW's reluctance to permit the appellants counsel access to her records undoubtedly played a significant part in the trial counsel's decision to withhold them. That reluctance, however, did not amount to a bar against their release. Trial counsel still must examine evidence in the possession, custody, or control of the military authorities, and disclose information favorable to the defense.

While it is apparent trial counsel here made a conscientious effort to balance their discovery obligations against DW's privacy concerns, the presence or absence of good faith is not the issue. "The suppression by the prosecution of

evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” Trial counsel should not have withheld the records.

... Whenever the government withholds evidence, it assumes the risk that—as here—the evidence will turn out to be material and favorable to the defense.

Id. at 671-72.

27. Unfortunately, there are far too many of these discovery and *Brady* violations in our military justice system. See *United States v. Trigueros*, 69 M.J. 604, 608 (A. Ct. Crim. App. 2010) (government failed to disclose medical records of health counseling sessions which victim attended following alleged rape); *United States v. Roberts*, 59 M.J. 323 (C.A.A.F. 2004) (military judge erred in not ordering government to disclose to the defense information about lead investigator which could have been used for impeachment); *United States v. Behenna*, 70 M.J. 521 (A. Ct. Crim. App. 2011) *review granted* 2012 CAAF LEXIS 61 (January 13, 2012).

28. The Government does not get a “do over” in this case. The Government has so completely misapprehended its professional and constitutional obligations that the case cannot be saved. These are, as one judge remarked, “self-inflicted wounds.” *United States v. Lawrence*, 19 M.J. 609, 614 (A.C.M.R. 1984). They could have easily been avoided if the Government had played fairly and within the bounds of zealous professional advocacy. Here, the Government appears to have committed the same fatal error as the prosecutors in *Koubriti*: the Government “abandoned [the] objectivity or impartiality that any professional prosecutor must bring to his work.” 336 F. Supp. 2d at 681. In so doing, the Government has caused irreparable prejudice to the accused.

CONCLUSION

29. For these reasons, and for the reasons outlined in the Defense’s Reply to the Government’s Response to the Defense Motion to Compel Discovery, and in accordance with the Rules for Courts-Martial (R.C.M.) 701(g)(3)(D), the Defense moves to dismiss all charges in this case with prejudice.

Respectfully submitted,



DAVID EDWARD COOMBS
Civilian Defense Counsel

IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES

v.

MANNING, Bradley E., PFC
HHC, U.S. Army Garrison
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)
)
) **PROTECTIVE ORDER**
) **FOR**
) **CLASSIFIED INFORMATION**

) **DATED:** 16 mar 2012

1. This matter comes before the Court upon motions by both defense and the prosecution for a Protective Order to prevent the unauthorized disclosure or dissemination of classified national security information which will be reviewed by, or made available to, or is otherwise in the possession of, the accused and the parties in this case.

2. The Court finds this case will involve information that has been classified in the interest of the national security. The storage, handling and control of this information will require special security precautions mandated by statute, executive order, and regulation, and access to which requires the appropriate security clearances and a "need-to-know." Under Executive Order 13526, "need-to-know" means a determination within the executive branch in accordance with directives issued pursuant to this order that a prospective recipient requires access to specific classified information in order to perform or assist in a lawful and authorized governmental function.

3. Pursuant to the authority granted under Military Rule of Evidence (MRE) 505; the general supervisory authority of the Court; and in order to protect the national security, it is hereby **ORDERED** that the Prosecution's Motion for a Protective Order under MRE 505(g)(1) is **GRANTED**; and it is further **ORDERED** that:

a. Purpose. The purpose of this Order is to establish the procedures that must be followed by the accused, all defense counsel of record, members of the defense team, all other counsel involved in this case, any Court personnel, and all other individuals who receive access to, or otherwise are in possession of, classified documents or information in connection with this case.

b. Application. The procedures set forth in this Protective Order and MRE 505 shall apply to all pre-trial, post-trial, and appellate aspects of this case, and may be modified from time to time by further order of the Court acting under MRE 505 and the Court's inherent supervisory authority to ensure a fair and expeditious trial.

c. Definition. The following definitions apply.

(1) As used herein, the terms "classified national security information and documents," "classified information," and "classified documents" refer to:

(a) Any classified document or information which has been classified by any Executive Branch agency in the interests of national security or pursuant to Executive Order 13526 or its predecessor Orders as "CONFIDENTIAL," "SECRET," or "TOP SECRET," or additionally controlled as "SENSITIVE COMPARTMENTED INFORMATION (SCI);"

(b) Any document or information, regardless of its physical form or characteristics, now or formerly in the possession of a private party, which has been derived from United States government information that has been classified by the United States pursuant to Executive Order 13526 or its predecessor Orders as "CONFIDENTIAL," "SECRET," or "TOP SECRET," or additionally controlled as "SENSITIVE COMPARTMENTED INFORMATION (SCI);"

(c) Any other classified information, in any form, previously known to the accused or defense counsel;

(d) Any document and information, including non-written, aurally acquired information, which the accused or defense counsel have been notified orally or in writing that such document or information may be classified; or,

(e) Any information, regardless of place or origin and including "foreign government information," as that term is defined in Executive Order 13526, that could reasonably be believed to contain classified information; and,

(f) Any information obtained from any agency, department or other governmental entity, including a member of the intelligence community, as defined in 50 U.S.C. § 401a, that could reasonably be believed to contain classified information.

(2) As used herein, the words "documents" or "information" shall include, but are not limited to, all written or printed matter of any kind, formal or informal, including originals, conforming copies and non-conforming copies (whether different from the original by reason of notation made on such copies or otherwise), and further include, but are not limited to:

(a) Papers, correspondence, memoranda, notes, letters, reports, summaries, photographs, maps, charts and graphs, inter-office and intra-office communications, notations of any sort concerning conversations, meetings, or other communications, bulletins, cables, telexes, telecopies, teletypes, telegrams, and telefacsimiles, invoices, accountings, worksheets, and drafts, alterations, modifications, changes and amendments of any kind to the foregoing;

(b) Graphic or oral records or representations of any kind, including, but not limited to, photographs, maps, charts, graphs, microfiche, microfilm, videotapes, sound recordings of any kind, and motion pictures;

(c) Electronic, mechanical or electric records of any kind, including, but not limited to, tapes, cassettes, disks, recordings, films, typewriter ribbons, word processing or other computer tapes or disks, and all manner of electronic data processing storage; and

(d) Information acquired aurally, or in any other manner not detailed in (a) through (c), above.

(3) As used herein, "Access to classified information" means having access to, reviewing, reading, learning, or otherwise coming to know in any manner any classified information.

(4) As used herein, "government facility" shall mean a United States government building that is approved for handling and storage of classified information up to the "SECRET" level.

(5) As used herein, the "court security officer" is Mr. Jay Prather for this case, for the purpose of supervising security arrangements necessary to protect from unauthorized disclosure any classified documents or information submitted or made available to the Court in connection with this case.

d. Declassification. All classified documents, and information contained therein, shall remain classified unless the documents bear a clear indication that they have been declassified by the agency or department that is the original classification authority's agency of the document or the information contained therein (hereinafter, the "originating agency").

e. Public Domain. Information in the public domain is ordinarily not classified. However, if classified information is reported in the press or otherwise enters the public domain, the information does not lose its classified status merely because it is in the public domain. And information reported in the press or otherwise in the public domain may be considered classified and subject to the provisions of MRE 505 if the information in fact remains classified and is confirmed by any person who has, or had, such access to classified information and that confirmation corroborates the information in question. Accordingly, any attempt by the accused or defense counsel to have classified information that has been reported in the public domain confirmed or denied at trial or in any public proceeding in this case shall be governed by MRE 505 and all provisions of this Order.

f. Security Experts. Detailed security experts shall provide advice concerning procedures governing the appropriate storage, handling, and transmittal of presumptively classified documents and information, pursuant to this order and applicable regulations and federal law. Detailed security experts should be consulted by defense and trial counsel regarding any question of derivative classification or any other matter that could reasonably be believed to relate to classified information, but are not authorized to make classification determinations; that is, whether information is properly classified.

g. Trial Counsel. The Court has been advised that all "trial counsel" detailed to this case have the requisite security clearances to have access to the classified documents and information

that relates to this case. All references to trial counsel, as used in this Order, refer only to the attorneys listed in this paragraph.

h. Protection of Classified Information. The Court finds that, in order to protect the classified documents and information involved in this case, no person, except the military judge, trial counsel, members of the prosecution team, appropriately cleared United States Government personnel, personnel of the originating agency, defense counsel, the accused, and members of the defense team shall have access to the classified documents and information in this case. No defense counsel or member of the defense team shall have access to any classified documents and information in this case unless that person shall first have:

(1) Signed the Memorandum of Understanding in Appendix A, agreeing to comply with the terms of this Order. The signed Memorandum of Understanding shall be filed with the Court and added to the appellate record. The substitution, departure, or removal for any reason from this case of defense counsel, or anyone associated with the defense team, shall not release that person from the provisions of this Order or the Memorandum of Understanding executed in connection with this Order.

(2) Persons other than trial counsel, appropriately cleared United States Government personnel, and personnel of the originating agency, can only obtain access to classified documents and information after having been granted a security clearance through coordination with the trial counsel and with permission of the Court, either through this Order (for those named in paragraph 3(i) below), or by a separate Order sought by the defense. The Government shall have the opportunity to object to and litigate the appropriateness of any additional disclosures of classified information under MRE 505. Before any person other than trial counsel, appropriately cleared United States Government employees, and personnel of the originating agency, are permitted by the Court to inspect and review classified documents or information, that person must also sign the Memorandum of Understanding.

i. Defense Counsel. Subject to the provisions of paragraph 3(h), defense counsel of record shall be given access to classified documents and information as required by the government's discovery obligations and otherwise as necessary to prepare for proceedings in this case. This Order shall apply to any substituted counsel in the event that any defense counsel of record discontinue their involvement in this matter, so long they meet all requirements under this order. Any additional person whose assistance the defense reasonably requires may only have access to classified documents and information in this case after obtaining approval, through the trial counsel, from the Deputy Chief of Staff for Intelligence, United States Army pursuant to Army Regulation 380-67, *Personnel Security Program*, paragraph 3-23f. The Government shall have the opportunity to object to and litigate the appropriateness of any additional disclosures of classified information under MRE 505.

j. Security Clearance. Unless already holding an appropriate security clearance and approved for access to classified documents and information in this case, for the purpose of establishing security clearances necessary for access to classified documents and information that may be involved in this case, all persons whose assistance the defense or Court reasonably requires in this case shall complete a standard Form 86 ("Security Investigation Data for

Sensitive Position"), attached releases, and fingerprints, to be submitted to the trial counsel. The trial counsel shall take all reasonable steps to process all security clearance applications.

k. Area of Review. Defense counsel shall only discuss, store, review, and otherwise handle classified documents and information in an approved government facility. Defense counsel shall prepare any and all pleadings, documents, or other substantive communications containing classified information, in a government facility. The trial counsel shall ensure the government facility will be outfitted with any secure office equipment requested by the defense that is reasonable and necessary to the preparation of the accused's defense in this case. The security experts detailed to the defense, in consultation with defense counsel, shall establish procedures to assure that the government facilities are maintained and operated in the most efficient manner consistent with the protection of classified documents and information.

l. Procedures for Handling of Classified Information. Defense counsel and the defense team shall have access to classified documents and information only as follows:

(1) All classified documents and information produced by the United States to the defense counsel, in discovery or otherwise, and all classified documents and information possessed, created, or maintained by the defense counsel, shall be stored, maintained, and used only in the government facility, as outlined in this ORDER.

(2) The defense counsel shall have free access to the classified documents and information made available to them in the government facility, and shall be allowed to take notes and prepare documents with respect to those materials.

(3) No person, including the defense counsel, shall copy or reproduce any classified documents and information in any form, except under the direct and on-site supervision of the security experts detailed to the defense.

(4) All documents, pleadings, and substantive communications prepared by the defense that do or may contain classified information, shall be transcribed, recorded, typed, duplicated, copied, or otherwise prepared only by persons who have received an appropriate approval for access to classified documents and information, and in the government facility on the three provided laptop computers in accordance with the procedures approved by the security experts detailed to the defense. All such documents and any associated materials (such as notes, drafts, copies, typewriter ribbons, magnetic recordings, and exhibits) containing classified information. **Nothing in this ORDER shall be construed to authorize trial counsel access to any attorney-client privileged information;**

(5) The defense counsel shall discuss classified documents and information only within the government facility, and shall not discuss or attempt to discuss classified documents or information over any standard commercial telephone instrument or office intercommunication system, including but not limited to the Internet.

(6) The defense shall not disclose, without prior approval by the United States in the first instance or by the Court upon notice to and opportunity to be heard by the United States,

the contents of any classified documents or information to any person not authorized pursuant to this Order, including defense witnesses, except the Court, Court personnel, and the trial counsel, but only if the court security officer verifies (1) the intended recipient holds the required security clearance; (2) that the intended recipient has signed the Memorandum of Understanding in Appendix A; and (3) the intended recipient has a need-to-know. Trial counsel shall be given an opportunity to be heard by the Court in response to any defense request to the Court for disclosure to a person not named in this Order. Any person approved by the United States in the first instance or by the Court upon notice to and an opportunity to be heard by the United States for disclosure under this paragraph shall be required to obtain the appropriate security clearance as necessary, to sign and submit to the Court the Memorandum of Understanding in Appendix A, and to comply with all terms and conditions of this Order. If preparation of the defense requires that classified documents or information be disclosed to persons not named in this Order, then, upon approval by the Court, the trial counsel shall promptly seek to obtain security clearances for them at the request of defense counsel.

The defense shall provide the trial counsel with the names of any intended recipients(s) and notice of the classified information that is expected to be disclosed or elicited pursuant to MRE 505(h)(3). Notice shall be provided in writing, no less than ten duty days to allow the trial counsel to file an objection, if any, under MRE 505 with the Court. At all times that defense discloses classified information under this subparagraph, a defense security expert shall be present to assist the defense in complying with this subparagraph.

(7) If trial counsel advises the defense counsel, in writing, that certain classified information or documents may not be disclosed to the accused, then defense counsel shall not disclose such information or documents to the accused without prior concurrence of the trial counsel, absent such concurrence, approval of the Court. Trial counsel shall be given an opportunity to be heard in response to any defense request for disclosure to the accused of classified information.

m. Restrictions on Accused's Access to Classified Information The accused and defense are not authorized to discuss, handle, review or otherwise transmit classified information outside of an approved government facility.

n. Filings with the Court. The following rules apply with respect to filings.

(1) Until further order of this Court, any pleading, document, or other substantive communication filed by the defense counsel that contains classified information or information reasonably believed to be classified, shall be filed with the Court through the court security officer either by approved courier or through SIPRNET. The date and time of submission to the court security officer shall be considered the date and time of filing. At the time of making a submission to the court security officer, trial counsel and defense counsel shall notify the Court and other party via electronic communication that a submission was made to the court security officer and provide a title of the document, which does not disclose any potentially classified information. The court security officer shall promptly deliver to the Court and trial counsel, any filing by the defense counsel that contains classified information.

(2) The court security officer shall promptly examine any pleading or other document, filed by the defense counsel, through their security experts or approved courier, and verify whether the pleading or document contains classified information.

o. Government Filings. Any pleading or other document filed by the trial counsel containing classified information shall be filed with the Court through the court security officer following the same procedures as outlined in paragraph 3(n). The date and time of physical submission to the court security officer shall be considered the date and time of the filing. The court security officer shall immediately deliver to the Court and defense counsel (unless such filing is ex parte) any pleading or document to be filed by the government that contains classified information.


p. Violations of this Order. Any unauthorized disclosure of classified information may constitute violations of the Uniform Code of Military Justice as well as criminal laws of the United States, including but not limited to, the provisions of Sections 641, 793, 794, 798, 952, and 1924, Title 18, United States Code, and Sections 421 and 783(b), Title 50, United States Code. Attorneys who violate this Order may be reported to their State Bar Association. In addition, any violation of the terms of this Order shall be brought immediately to the attention of this Court and may result in a charge of contempt of court and possible referral for criminal prosecution. Any breach of this Order may also result in the termination of an individual's access to classified information. Persons subject to this Order are advised that direct or indirect unauthorized disclosure, retention, or negligent handling of classified documents or information could cause serious damage, and in some cases, exceptionally grave damage to the national security of the United States, or may be used to the advantage of a foreign nation against the interests of the United States. This Protective Order is to ensure that those authorized to receive classified information in connection with this case will never divulge that information to anyone not authorized to receive it, without prior written authorization from the originating agency and in conformity with this Order. The Court will take into consideration whether any counsel relied upon their security experts appointed by the United States Government to assist them.

q. Property of the United States. All classified documents and information to which defense counsel and defense team members have access in this case are now and will remain the property of the United States. The defense counsel and defense team members who receive classified documents and information shall return all such classified documents and information in their possession obtained through discovery from the United States in this case, or for which they are responsible because of access to classified documents and information, upon demand of the court security officer. The notes, summaries, and other documents prepared by the defense that do or may contain classified information shall remain at all times in the government facility under the guidance of the security experts detailed to the defense for the duration of this case. At the conclusion of this case, all such notes, summaries, and other documents, which the defense counsel wants to be retained, will be sealed and provided to the Criminal Law Division, Office of the Staff Judge Advocate, U.S. Army Military District of Washington for proper storage during the appellate process, if applicable. Any other such documentation shall be destroyed by the security experts detailed to the defense in the presence of defense counsel.

r. Further Protective Order. Nothing in this Order shall preclude the United States from seeking a further protective order pursuant to MRE 505 as to particular items of discoverable material.

s. Subsequent Action. A copy of this Order shall be issued forthwith to counsel for the accused, who shall be responsible for advising the accused and defense team members of the contents of this Order. The defense counsel and defense team members to be provided access to classified information shall execute the Memorandum of Understanding appended to this Order, and defense counsel shall file executed originals with the Court and the court security officer and serve executed originals of such document upon the United States. The execution and filing of the Memorandum of Understanding is a condition precedent for defense counsel, defense team members, and any other person working for the defense to have access to classified information. It is also a condition precedent for the accused and any defense witness to have access to classified information pursuant to paragraph 3(l)(6) above.

ORDERED, this the 14th day of March 2012.


DENISE R. LIND
COL, JA
Chief Judge, 1st Judicial Circuit

IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES

v.

MANNING, Bradley E., PFC
U.S. Army, xxx-xx-
HHC, U.S. Army Garrison
Joint Base Myer-Henderson Hall
Fort Myer, Virginia 22211

RULING: DEFENSE MOTION
TO COMPEL DEPOSITIONS

DATED: 16 March 2012

Defense moves this Court to Compel Oral Depositions prior to trial in accordance with RCM 702(c)(2). Government opposes. After considering the pleadings, evidence presented, and argument of counsel, the Court finds and concludes the following:

Background:

1. Defense moves the Court to Order oral depositions of the following individuals:

a. **CPT James Kolky**, 1st Cavalry Division, Fort Hood, Texas, Brigade S-2, (254) 285-5093, james.koky@conus.army.mil. (Defense proffers he will testify about his classification review of the three Apache gun videos that were sent to his Division by FORSCOM. Specifically, he will testify that the videos were not classified at the time of their alleged release. However, he will testify that he believes that videos should have been classified. He will also testify regarding his classification determination).

b. **RADM Kevin M. Donegan**, Director of Operations for United States Central Command, 7115 South Boundary Boulevard, MacDill Air Force Base, Florida 33621, (312) 651-4134, kevin.donegan@centcom.mil. (Defense proffers that RADM Donegan conducted classification reviews on two PowerPoint slide presentations of official reports originated by USCENTCOM. The PowerPoint presentations are the subject of Specification 10 of Charge II. RADM Donegan will testify regarding his classification determination and his belief of the impact on national security due to the release of the information.)

c. **Robert E. Betz**, USCYBERCOM Chief Classification Advisory Officer, the Government has not provided the defense with contact information for Mr. Betz. (Defense proffers Mr. Betz will testify about his classification determination concerning the alleged chat logs between Mr. Lamo and PFC Bradley Manning. Specifically, he will testify about his classification assessment of information discussed in the alleged chat logs.)

d. **LtGen Robert E. Schmidle, Jr.**, Deputy Commander U.S. Cyber Command, (703) 614-3663, robert.schmidle@usmc.mil. LtGen Schmidle, is the Original Classification Authority

(OCA) over the information discussed by Mr. Betz. (Defense proffers LtGen Schmidle will testify that he concurs with the classification determination and impact statements made by

Mr. Betz. The Defense would like to question him regarding his declaration and the basis for his belief.)

e. **VADM Robert S. Harward**, USCENTCOM, Deputy Commander, MacDill Air Force Base, Florida 33621, (813) 840-5104, robert.harward@jfc.com.mil. (Defense proffers VADM Harward will testify concerning his classification review and classification determination concerning the CIDNE Afghanistan Events, CIDNE Iraq Events, other briefings and the BE22 PAX.wmv video. Specifically, VADM Harward will testify concerning his classification determination and his belief of the impact on national security from having this information released to the public.)

f. **Patrick F. Kennedy**, Under Secretary of State for Management. (Defense proffers that Government has not provided contact information for Mr. Kennedy; that Mr. Kennedy will testify concerning his review of the disclosure of Department of State Diplomatic Cables stored within the Net-Centric Diplomacy server and part of SIPDIS. Mr. Kennedy will testify concerning his classification determination and the impact of the release of the information on national security.)

g. **RADM David B. Woods**, Commander, Joint Task Force – Guantanamo (JTF-GTMO), (703) 697-3650, david.b.woods@navy.mil. (Defense proffers that RADM Woods will testify concerning his review of the disclosure of five documents, totaling twenty-two pages. RADM Woods will testify concerning his classification determination and his belief regarding the impact of the release of the information on national security.)

h. **Mr. Robert Roland**. (Defense proffers that the government has not provided contact information for Mr. Roland).

2. Defense argues the requested depositions of Mr. Kolky and Mr. Roland are needed because the witnesses were essential witnesses and should have been produced in person at the Article 32 hearing. An additional ground for the remaining depositions is that the Article 32 Investigating Officer improperly determined that the witnesses were not reasonably available at the Article 32 hearing. The witnesses were essential witness and should have been produced in person at the Article 32 hearing. Defense further argues that the depositions are necessary because the Government impeded Defense access to interview the witnesses.

Factual Findings:

The Court adopts the following factual findings as stipulated to by the parties:

1. PFC Manning is charged with five specifications of violating a lawful general regulation, one specification of aiding the enemy, one specification of disorders and neglects to the prejudice of good order and discipline and service discrediting, eight specifications of communicating classified information, five specifications of stealing or knowingly converting Government property, and two specifications of knowingly exceeding authorized access to a Government computer, in violation of Articles 92, 104, and 134, UCMJ, 10 U.S.C. §§ 892, 904, 934 (2010).

2. The original charges were preferred on 5 July 2010. Those charges were dismissed by the convening authority on 18 March 2011. The current charges were preferred on 1 March 2011. On 16 December through 22 December 2011, these charges were investigated by an Article 32 IO. The charges were referred without special instructions to a general court-martial on 3 February 2012.

3. The Defense requested the OCAs' classification determinations during discovery on 15 November 2010. On or about November 2011 the Defense had all of the OCA classification determinations.

4. On 2 December 2011, the Defense submitted its witness list to the Article 32 Investigating Officer (IO), naming the seven OCAs. The witness list did not include Mr. Roland. On 7 December, the Government responded to the Defense's witness list. The Government objected that CPT Kolky was not relevant. The Government requested the IO to find each OCA not reasonably available for the Article 32 given his duty position because the difficulty, delay, and effect on military operations outweighed the significance of his testimony under MRE 405(g)(1)(B). On 8 December 2011, the Defense challenged the Government's position that the OCAs were not reasonably available.

5. On 14 December 2011, the IO made his determinations regarding defense requested witnesses. In relevant part, the IO found:

CPT Kolky – not relevant to the form of the charges, the truth of the charges or information as may be necessary to make an informed recommendation as to disposition; specifically; whether three Apache gun videos that were sent to his Division were not classified at the time of their alleged release and whether they should have been, recognizing that the government states the video is not classified and doesn't allege it is classified, is not relevant to a determination as to whether PFC Manning committed the charged offenses and, if so, what the disposition of those charges should be.

RADM Donegan – not reasonably available because while his testimony is relevant, he is located in Florida and is CENTCOM's Director of Operations; the significance of his expected testimony with respect to his classification determinations concerning the two PowerPoints at issue does not outweigh the difficulty, expense, and effect on military operations of obtaining his presence in the investigation.

Mr. Betz – not reasonably available because while his testimony is relevant, he is CYBERCOM's Chief Classification Advisory Officer; the significance of his expected testimony with respect to his classification determinations concerning the alleged chat logs between Mr. Lamo and PFC Manning does not outweigh the difficulty, expense, and effect on military operations of obtaining his presence in the investigation.

LTG Schmittle - not reasonably available because while his testimony is relevant, he is CYBERCOM's Deputy Commander; the significance of his expected testimony with respect to his classification determinations concerning the alleged chat logs between Mr. Lamo and PFC Manning does not outweigh the difficulty, expense, and effect on military operations of obtaining his presence in the investigation.

VADM Harward - not reasonably available because while his testimony is relevant, he is located in Florida and is CENTCOM's Deputy Commander; the significance of his expected testimony with respect to his classification determinations concerning the CIDNE Afghanistan events, CIDNE Iraq Events, other briefings, and the BE22 PAX.wmv video does not outweigh the difficulty, expense, and effect on military operations of obtaining his presence in the investigation.

Mr. Kennedy - not reasonably available because while his testimony is relevant, he is the Under Secretary of State for Management; the significance of his expected testimony with respect to his classification determinations concerning diplomatic cables does not outweigh the difficulty, expense, and effect on military operations of obtaining his presence in the investigation.

RADM Woods - not reasonably available because while his testimony is relevant, he is Commander of the Joint Task Force – Guantanamo; the significance of his expected testimony with respect to his classification determinations concerning the documents at issue does not outweigh the difficulty, expense, and effect on military operations of obtaining his presence in the investigation.

6. The Defense also objected to the IO considering the OCA affidavits submitted IAW 28 U.S.C. 1746.
7. While the IO was pondering whether to consider the OCA affidavits, the Government offered to have the OCA testify telephonically. The defense objected to telephonic testimony.
8. On 23 January 2012, the Defense filed a Request for Oral Deposition with the General Court-Martial Convening Authority (GCMCA). On 1 February 2012, the GCMCA denied the Defense's request finding the IO did not improperly determine that the witnesses were not reasonably available and because there is no evidence that the witnesses will be unavailable for trial if found relevant and necessary.
9. On 20 January 2012, the Defense filed a Discovery Request asking for complete contact information for three OCAs. On 27 January 2012, the Government responded that it would not provide contact information for the OCAs because they were not Government witnesses but if they became Government witnesses, the Government would assist in coordinating meetings for defense interviews.
10. On 1 February 2012, the Defense advised the Government of its intent to explore calling the OCAs as witnesses and asked for contact information. On 1 February 2012, the Government advised the Defense it would provide contact information and start working with each organization to determine the best way for the defense to contact them. On 29 February 2012 the Government has provided contact information for Mr. Betz.
11. The Government advised the Court that for the 2 non-DoD OCA, the Defense may have to file a request with the agency to interview the OCA IAW *Touhy* regulations promulgated IAW 5 U.S.C. 301. Defense disputes that *Touhy* applies when the U.S. is a party, citing *Alexander v. Federal Bureau of Investigation*, 186 F.R.D. 66 (D.D.C. 1998). The Government offered to assist the Defense in contacting the OCA and in the *Touhy* process, if applicable.

The Law:

1. Article 49, UCMJ and RCM 702 govern depositions in courts-martial. RCM 702 provides that a deposition may be ordered whenever, after prefferral of charges, due to exceptional circumstances of the case, it is in the interest of justice that the testimony of a prospective witness be taken and preserved for use at an Article 32 investigation or for trial.
2. The purpose of a deposition is to preserve the testimony of an unavailable witness. Article 49(d) and analysis to RCM 702(a).
3. Both Article 49 and RCM 702 states that a request for deposition may be denied only for good cause. The discussion to the rule provides that the fact that a witness is or will be available for good cause in the absence of unusual circumstances, such as the improper denial of a witness request at an Article 32 hearing, unavailability of an essential witness at an Article 32 hearing, or when the Government has improperly impeded defense access to a witness.
4. RCM 405(g)(1)(A) and (g)(2)(a) provide that a relevant witness, to include a witness who is timely requested by the accused, who is not cumulative shall be produced if reasonably available. The investigating officer (IO) determines whether a requested relevant witness is reasonably available. A witness is "reasonably available" when the witness is located within 100 miles of the situs of the investigation and the significance of the testimony and personal appearance of the witness outweighs the difficulty, expense, delay, and effect on military operations of obtaining the witness' appearance.

5. RCM 405(g)(4)(B) provides in relevant part that the Article 32 IO can consider sworn statements over the objection of the defense if the witness is not reasonably available. RCM 405 does not provide authority for the IO to consider unsworn statements over the objection of the defense if the witness is not reasonably available.

6. 28 USC 1746 provides in relevant part "Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same, such matter may, with like force and effect be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him as true under penalty of perjury, and dated in substantially the following form: (1) If executed without the United States: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (2) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date)."

7. RCM 405(g)(4)(B) is a law of the United States for purposes of 28 USC 1746 that allows proof of a matter by sworn statement. An Article 32 IO may consider an affidavit filed IAW 28 USC 1746 to the same extent he/she considers a sworn statement. Unsworn declarations under 28 USC 1746 are elevated to the level of sworn statements because they subject the declarant to the penalties of perjury under the United States Code and False Swearing under Article 134, UCMJ (element 1 – that the accused took an oath or an equivalent).

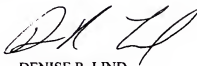
8. A witness has no obligation to submit to a pretrial interview. *U.S. v. Morgan*, 24 MJ 93 (CMA 1987). The Government may not induce a witness to refuse to answer questions of defense counsel. *U.S. v. Killebrew*, 9 MJ 154 (CMA 1980).

Analysis:

1. The IO's determination regarding the requested Defense witnesses was not an improper denial. The IO properly balanced the significance of each witness' testimony against the difficulty, expense, and effect on military operations of obtaining that presence in the investigation.
2. The IO properly considered the OCA affidavits IAW 28 USC 1746. This statute provides that such affidavits may be used as proof under any law of the United States where any matter is required or permitted to be proved by sworn statement. RCM 405(g)(4)(B) is such a law.
3. Military cases addressing deposition as a remedy for an Article 32 investigation where the IO improperly denied production of an essential witness such as a key witness providing the only direct evidence of a crime or the victim of a sexual assault. Unlike such witnesses, the OCA providing classification reviews are not essential witnesses.
4. The Government has not impeded the Defense access to the OCA. Recognizing the challenges of coordinating interviews with government witnesses in high level positions, the Government has volunteered to assist the defense in coordinating interviews and in any applicable *Touhy* process.
5. There is no evidence that any of the witnesses will be unavailable for trial should they be deemed relevant and necessary.
6. There is good cause to deny the request for depositions for all of the witnesses.

RULING: Defense Motion to Compel Depositions is **DENIED**.

ORDERED, this the 16th day of March 2012.



DENISE R. LIND
COL, JA
Chief Judge, 1st Judicial Circuit

UNITED STATES

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**MANNING, Bradley E., PFC
HHC, U.S. Army Garrison
Joint Base Myer-Henderson Hall
Fort Myer, Virginia 22211**

ORDER TO COURT SECURITY OFFICER AND DETAILED SECURITY EXPERTS

DATED: 22 March 2012

1. This matter comes before the Court upon the Protective Order entered on 16 March 2012 (hereinafter "Protective Order") to prevent the unauthorized disclosure or dissemination of classified national security information which will be reviewed by, or made available to, or is otherwise in the possession of, the accused and the parties in this case.

2. The Court finds this case will involve information that has been classified in the interest of the national security. The storage, handling and control of this information will require special security precautions mandated by statute, executive order, and regulation, and access to which requires the appropriate security clearances and a "need-to-know." Under Executive Order 13526, "need-to-know" means a determination within the executive branch in accordance with directives issued pursuant to this order that a prospective recipient requires access to specific classified information in order to perform or assist in a lawful and authorized governmental function.

3. Pursuant to the authority granted under Military Rule of Evidence (MRE) 505; the general supervisory authority of the Court; and in order to protect the national security, it is hereby **ORDERED** that:

a. **Definitions.** All definitions listed in the Protective Order shall apply herein.

b. Court Security Officer. Mr. Jay Prather shall serve as the court security officer for supervising security arrangements necessary to protect from unauthorized disclosure any classified documents or information submitted or made available to the Court in connection with the above-referenced court-martial.

(1) The defense may request to disclose classified information to recipients not authorized pursuant to the Protective Order, subject to the approval by the United States or the Court. If such request is approved, the court security officer shall verify that the intended recipients of classified information hold the required security clearance, sign the Memorandum of Understanding in Appendix A of the Protective Order, and have a need-to-know. The court security officer may request the assistance of trial counsel to verify whether the intended recipients hold the required security clearance. The court security officer shall promptly notify

the United States and the Court whether such intended recipients of classified information satisfy these three requirements.

(2) The court security officer shall accept receipt of any pleading, document, or other substantive communication filed by either party that contains classified information or information reasonably believed to be classified, if required.

(3) The court security officer shall promptly examine any pleading or other document filed by either party that contains classified information or information reasonably believed to be classified to determine any question of derivative classification or any other matter that could reasonably be believed to relate to classified information, but is not authorized to make classification determinations; that is, whether information is properly classified and verify whether the pleading or document contains classified information and is properly marked.

(4) The court security officer shall promptly deliver to the Court and opposing party any filing by either party that contains classified information, except for any *ex parte* filing which shall be delivered only to the Court, absent Court approval.

(5) The court security officer shall promptly notify the prosecution (as the Command's representative), over SIPRNET or by other approved means under Army Regulation 380-5, of any spillage of classified information.

c. Security Experts. Detailed security experts shall provide advice to their respective party concerning procedures governing the appropriate storage, handling, and transmittal of classified documents and information, pursuant to the Protective Order and applicable regulations and federal law. Detailed security experts shall also provide their respective party with procedures for preparing any document, pleading, and substantive communication that contains classified information or information reasonably believed to be classified. Detailed security experts should be consulted by the defense and the prosecution regarding any question of derivative classification or any other matter that could reasonably be believed to relate to classified information, but are not authorized to make classification determinations; that is, whether information is properly classified.

(1) A detailed security expert shall review, in-person or over SIPRNET, while in a government facility approved for classified information processing, any pleading, document, or subject of communication, including all attachments and enclosures thereto, which contains classified information or information reasonably believed to be classified, whether by original, derivative, or compilation, and verify whether the pleading or document contains classified information and is properly marked.

(2) A security expert detailed to the defense shall be present at all times that the defense intends to disclose or elicit classified information under paragraph 3(1)(6) of the Protective Order and shall promptly terminate any conversation whenever the defense elicits, or attempts to elicit, classified information not previously approved for disclosure by the United States or the Court, or whenever the intended recipient discloses classified information for which the defense has no need-to-know.

(3) If requested by the defense, a security expert detailed to the defense shall properly and promptly deliver any pleading or document filed by the defense to the court security officer and the prosecution, except for any *ex parte* filing which shall be delivered only to the Court or court security officer.

(4) Detailed security experts to the defense shall properly destroy, by means approved for classified information destruction, any documents requested by the defense, in the presence of the defense.

(5) Detailed security experts to the defense shall promptly notify the court security officer, over SIPRNET or by other approved means under Army Regulation 380-5, of any spillage of classified information.

d. Communications. Any communication related to this case, including internal communications between members of the prosecution or defense and communications between the parties, the Court, and the court security officer, that contains classified information or information reasonably believed to be classified shall not be transmitted over any standard commercial telephone instrument or office intercommunication system, including but not limited to the Internet. Any communication related to this case, including internal communications between members of the prosecution or defense and communications between the parties, the Court, and the court security officer, that contains classified information or information reasonably believed to be classified shall be transmitted over SIPRNET or by other approved means under Army Regulation 380-5.

4. Further Order. The procedures set forth in this Order may be modified by further order of the Court acting under MRE 505 and the Court's inherent supervisory authority to ensure a fair and expeditious trial.

5. Army Regulation 380-5. No procedure in this Order shall operate to supersede, or cause a violation of, any provision of Army Regulation 380-5.

ORDERED, this the 22nd day of March 2012.



DENISE R. LIND
COL, JA
Chief Judge, 1st Judicial Circuit

Williams, Patricia CIV JFHQ-NCR/MDW SJA

From: Lind, Denise R COL USARMY (US) [denise.r.lind.mil@mail.mil]
Sent: Thursday, March 22, 2012 4:36 PM
To: Fein, Ashden MAJ USA JFHQ-NCR/MDW SJA; David Coombs; Williams, Patricia CIV JFHQ-NCR/MDW SJA
Cc: Matthew kemkes; Bouchard, Paul R CPT USARMY (US); Santiago, Melissa S CW2 USARMY (US); Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA; Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA; Ford, Arthur D. CW2 USA JFHQ-NCR/MDW SJA; ashden.fein@us.army.mil; Prather, Jay R CIV (US)
Subject: RE: Court Order to Security Officer and Detailed Security Experts (UNCLASSIFIED)
Attachments: document2012-03-22-162644.pdf
Signed By: denise.lind@us.army.mil

Classification: UNCLASSIFIED

Caveats: NONE

All,

Attached is the signed Security Expert Order. Trial counsel, please ensure all security officers are served with it. Ms. Williams, please add the order as the next AE in line.

D

Denise R. Lind
COL, JA
Chief Judge, 1st Judicial Circuit

-----Original Message-----

From: Fein, Ashden CPT USA JFHQ-NCR/MDW SJA
[mailto:Ashden.Fein@jfhqncr.northcom.mil]
Sent: Thursday, March 22, 2012 3:08 PM
To: Lind, Denise R COL USARMY (US); David Coombs
Cc: Kemkes, Matthew J MAJ USARMY (US); Bouchard, Paul R CPT USARMY (US); Santiago, Melissa S CW2 USARMY (US); Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Overgaard, Angel M CPT USARMY (US); Whyte, Jeffrey H CPT USARMY (US); Ford, Arthur D Jr CW2 USARMY (US); ashden.fein@us.army.mil
Subject: RE: Court Order to Security Officer and Detailed Security Experts (UNCLASSIFIED)

Ma'am,

IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES)

v.)

MANNING, Bradley E., PFC)

U.S. Army, xxx-xx-)

Headquarters and Headquarters Company,)

U.S. Army Garrison, Joint Base Myer-)

Henderson Hall, Fort Myer, VA 22211)

RULING:

AMICUS CURIAE FILINGS

DATED: 23 March 2012

The Court has been advised that there may be non-parties who will move the Court for leave to file an amicus curiae brief. The Court will not grant leave to a non-party to file an amicus brief. The Government or the Defense may attach a filing by a non-party as part of a party brief filed within the suspense dates set by the Court.



DENISE R. LIND

COL, JA

Chief Judge, 1st Judicial Circuit

Williams, Patricia CIV JFHQ-NCR/MDW SJA

From: Lind, Denise R COL USARMY (US) [denise.r.lind.mil@mail.mil]
Sent: Friday, March 23, 2012 6:30 PM
To: David Coombs
Cc: Matthew kemkes; Bouchard, Paul R CPT USARMY (US); Santiago, Melissa S CW2 USARMY (US); Williams, Patricia CIV JFHQ-NCR/MDW SJA; Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA; Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA; Ford, Arthur D. CW2 USA JFHQ-NCR/MDW SJA; ashden.fein@us.army.mil; Prather, Jay R CIV (US); Williams, Patricia CIV JFHQ-NCR/MDW SJA; Fein, Ashden MAJ USA JFHQ-NCR/MDW SJA
Subject: Rulings: Motion to Compel Discovery; Amicus Curiae Filings (UNCLASSIFIED)
Attachments: document2012-03-23-182149.pdf; document2012-03-23-182225.pdf
Signed By: denise.lind@us.army.mil

Classification: UNCLASSIFIED

Caveats: NONE

Counsel,

Attached are rulings re: Motion to Compel Discovery; Amicus Curiae Filings.

Ms. Williams please add as next AE in line.

D

Denise R. Lind
COL, JA
Chief Judge, 1st Judicial Circuit

Classification: UNCLASSIFIED

Caveats: NONE

Government Response: Upon Defense request, the United States promptly preserved all Quantico videos requested by Defense. On 6 December 2011, the United States produced all videos of the alleged Quantico incident, specifically BATES 00408902-00408903. The alleged video referenced by the Defense does not exist.

In an email to the Court dated 20 March 2012, the Defense accepted Trial Counsel's representation that the Government has provided the Defense with all videos provided to the Government by Quantico.

c. EnCase Forensic Images: An Encase forensic image of each computer from the Tactical Sensitive Compartmented Information Facility (T-SCIF) and the Tactical Operations Center (TOC) of Headquarters and Headquarters Company (HHC), 2nd Brigade Combat Team (BCT), 10th Mountain Division, Forward Operating Base (FOB) Hammer, Iraq. On 30 September 2010 CID requested preservation of hard drives used during the 2d BCT deployment to Iraq. The Defense submitted a preservation request for this evidence on 21 September 2011.

Government Response: On 21 September 2011 – more than one year after the accused's unit redeployed back to Fort Drum, New York – the Defense requested that the United States preserve these hard drives. The Government identified four commands or agencies that may possess hard drives responsive to this request and submitted a Request to Locate and Preserve Evidence to each command or agency. Those entities included: (1) 2d Brigade Combat Team, 10th Mountain Division (2/10 MTN); (2) the Federal Bureau of Investigation (FBI); (3) Third Army, United States Army Central (ARCENT); and (4) the Computer Crime Investigative Unit, U.S. Army Criminal Investigative Command (CCIU). The Government request to 2/10 MTN yielded the preservation of 181 hard drives, of which the United States has identified thirteen as being located within the SCIF during the unit's deployment to FOB Hammer. None of those thirteen hard drives contained the "bradley.manning" user profile. At the Article 39(a) session on 15 March 2012, the Government advised there were 14 hard drives responsive to the Defense discovery request. The Government argues the hard drives are not relevant and necessary for the Defense under RCM 703(f) and that, because they are classified, the rules of production under MRE 505 should govern whether the images are discoverable.

d. Damage Assessments and Closely Aligned Investigations: The following damage assessments and records from closely aligned investigations:

(1) Central Intelligence Agency: Any report completed by the WL Taskforce (WTF) and any report generated by the WTF under the direction of former Director Leon Panetta.

(2) Department of Defense: The damage assessment completed by the Information Review Task Force (IRTF) and any report generated by the IRTF under the guidance and direction of former Secretary of Defense Robert Gates. Additionally, the Defense requests all forensic results and investigative reports by any of the cooperating agencies in this investigation (DOS, FBI, DIA, the Office of the National Counterintelligence Executive (ONCIX), and the CIA).

(3) Department of Justice: Any documentation related to the DOJ investigation into the disclosures by WikiLeaks concerning PFC Bradley Manning, including any grand jury testimony or any information relating to any 18 U.S.C. § 2703(d) order or any search warrant by the government of Twitter, Facebook, Google or any other social media site.

(4) Department of State: The damage assessment completed by the DOS, any report generated by the task force assigned to review each released diplomatic cable, and any report or assessment by the DOS concerning the released diplomatic cables.

Government Response: The Government intends to disclose all relevant and necessary classified and unclassified grand jury testimony that the Government is authorized under the federal rules to the Defense. The Government: (1) confirms the existence of completed WTF and IRTF damage assessments; (2) confirms the existence of a damage assessment by DOS that is not complete; and (3) denies that ONCIX has produced an interim or final damage assessment. At the Article 39(a) session on 15 March 2012, the Government stated that it had no authority to disclose or discuss the requested damage assessments. The Government argues that Defense has not demonstrated that the damage assessments are relevant and necessary to an element of the offense or a legally cognizable defense and otherwise inadmissible in evidence under RCM 703(f) because the Defense is confusing prospective OCA classifications determinations assessing whether damage could occur (relevant to elements of charged offenses) with hindsight damage assessments determining what damage did occur (not relevant to elements of charged offenses). The Government further responded that it is unaware of any forensic results and investigative reports from within the DOS, FBI, DIA, ONCIX, or the CIA, that contributed to any law enforcement investigation.

2. The accused is charged with five specifications of violating a lawful general regulation, one specification of aiding the enemy, one specification of disorders and neglects to the prejudice of good order and discipline and service discrediting, eight specifications of communicating classified information, five specifications of stealing or knowingly converting Government property, and two specifications of knowingly exceeding authorized access to a Government computer, in violation of Articles 92, 104, and 134, UCMJ, 10 U.S.C. §§ 892, 904, 934 (2010).

3. The Defense Motion to Compel the EnCase Forensic Images, the damage assessments from WTF, IRTF, and DOS, and forensic and investigative reports from DOS, FBI, DIA, ONCIX, or the CIA remain at issue.

4. The Defense submitted the following proffers of relevance and evidence in support of its Motion to Compel:

EnCase Forensic Images: The Defense requested an EnCase forensic image of each computer from the T-SCIF and the TOC of Headquarters and Headquarter Company, 2nd Brigade Combat Team, 10th Mountain Division, Forward Operating Base Hammer, Iraq.

a. **Proffer of relevance**: The Defense proffers that an EnCase Image would allow its forensic expert to inspect the 14 seized government computers from the T-SCIF and TOC. Such inspection would allow the Defense to discover whether it was common for Soldiers to add technically unauthorized computer programs to their computers and that the practice of the unit

was to tacitly authorize that addition of unauthorized programs including but not limited to: mIRC (a full featured Internet Relay Chat client for Windows that can be used to communicate, share, play or work with others on IRC networks); Wget (a web crawler program designed for robustness over slow or unstable network connections); GEOTRANS (an application program which allows a user to easily convert geographic coordinates among a wide variety of coordinate systems, map projections and datums); and Grid Extractor (a binary executable capable of extracting MGRS grids from multiple free text documents and importing them into a Microsoft Excel spreadsheet) to their computers. The Defense argues this information is relevant because the Government has charged PFC Manning with adding unauthorized software to his government computer in Specifications 2 and 3 of Charge III. The information is relevant to establish the defense theory that the addition of software not on the approved list of authorized software was authorized by the accused's chain of command through the practice of condoning and implicitly or explicitly approving the additions of such software.

b. Evidence: The Defense has provided the Court with a summary of what the defense asserts the following witnesses depicted with the accused testified to at the Article 32 investigation:

CPT Steven Lim – Soldiers listened to music and watched movies on their computers and saved music, movies, and games (unauthorized software).

CPT Casey Fulton – Soldiers saved music games, and computers to their computers. She added M-IRC Chat and Google Earth to her computer.

Mr. Jason Milliman – Soldiers added unauthorized games and music to their computers and was aware Soldiers were adding unauthorized software to their computers, although he did not believe the practice was common.

CPT Thomas Cherepko – He saw unauthorized music, movies, games, and unauthorized programs improperly stored on the T-Drive. He advised his immediate supervisor and the Brigade Executive Officer concerning the presence of unauthorized media on the T-Drive. Nothing was done.

Ms. Jihreah Showman – She and everyone else in the unit viewed M-IRC Chat as mission essential and everyone put it on their computers.

Damage Assessments and Closely Aligned Investigations: The Defense requested the following damage assessments and records from closely aligned investigations:

(1) **Central Intelligence Agency:** Any report completed by the WTF and any report generated by the WTF under the direction of former Director Leon Panetta.

(2) **Department of Defense:** The damage assessment completed by the Information Review Task Force (IRTF) and any report generated by the IRTF under the guidance and direction of former Secretary of State Robert Gates. Additionally, the Defense requests all forensic results and investigative reports by any of the cooperating agencies in this investigation (DOS, FBI, DIA, the Office of the national Counterintelligence Executive and the CIA).

(3) **Department of Justice:** The DOJ has conducted an investigation into the disclosures by WikiLeaks as referenced by Attorney General of the United States Eric H. Holder. The Defense requested any grand jury testimony and any information relating to any 18 U.S.C. §

2703(d) order or any search warrant by the government of Twitter, Facebook, Google or any other social media site that was relevant to PFC Bradley Manning.

(4) **Department of State:** The DOS formed a task force of over 120 individuals to review each released diplomatic cable. The task force conducted a damage assessment of the leaked cables and concluded that the information leaked either represented low-level opinions or was already commonly known due to previous public disclosures.

Proffer of Relevance for all Damage Reports: The Defense argues that evidence of damage assessments (whether favorable or not) are material to the preparation of the defense for the merits and sentencing IAW RCM 701(a)(2) and that, if the damage assessments are favorable, they are also relevant, helpful to the defense, and discoverable under RCM 701(a)(6) and *Brady v. Maryland*, 373 U.S. 83 (1963). Even if the extent of actual damage caused by the alleged leaks was not relevant to the merits, it is relevant discovery for the defense to prepare its presentencing case.

Evidence: The Defense provided its 30 November 2011 request to the Article 32 Investigation Officer (IO) for the production of evidence to include the damage assessments. That request includes the following:

a. 5 August 2010 creating the IRFT and 16 August 2010 letter from former Defense Secretary Robert Gates to Senator Carl Levin discussing the IRFT.

b. 8 November 2010 message from former CIA Director, Leon Panetta to CIA employees advising them that the Office of Security is directed to fully investigate the damage from WL. 22 December 2010 Washington Post article stating that the CIA established the WTF to assess the impact of exposure of thousands of leaked diplomatic cables.

c. 18 January 2011 Reuters article stating "Internal U.S. government reviews have determined that a mass leak of diplomatic cables caused only limited damage to U.S. interests abroad, despite the Obama administration's public statements to the contrary". The article listed the sources as two congressional aides familiar with briefings by State Department officials and Congress. The article further went on to state "National security officials familiar with the damage assessments being conducted by defense and intelligence agencies told Reuters the reviews so far have shown "pockets" of short-term damage, some of it potentially harmful. Long term damage to U.S. intelligence and defense operations, however, is unlikely to be serious, they said." And "But current and former intelligence officials note that while WL has released a handful of inconsequential CIA analytical reports, the website has made public few if any real intelligence secrets, including reports from undercover agents or ultra-sensitive technical intelligence reports, such as spy satellite pictures or communications intercepts."

All forensic results and investigative reports by any of the cooperating agencies in this investigation (DOS, FBI, DIA, the Office of the national Counterintelligence Executive and the CIA).

Proffer of relevance: None

Evidence: None

5. The Defense filed discovery requests for the EnCase Images, damage assessments, and forensic results and investigative reports by any of the cooperating agencies in the investigation. On 13 October 2011, the Defense made a specific request for *Brady* material, identifying the damage assessments. On 30 November 2011, the Government responded to the requests for the damage assessments under *Brady* that the Government has no knowledge of any *Brady* material in the possession of the CIA, Department of Defense, Department of Justice, or the Department of States, and it would furnish such records if it became aware of them and that the Government did not have authority to disclose the damage assessments. At or near 15 December 2011, the Government advised the Article 32 IO that the damage assessments were classified, that the Government does not have to discuss the substance of the damage reports, and that all but the IRTF are not under the control of military authorities. On 31 January 2012, the Government responded to Defense Discovery Requests for damage assessments stating it would not provide the damage requests because the defense failed to provide an adequate basis for its request and that the Defense was invited to renew its request with more specificity and an adequate basis for the request.

6. On 21 March 2015, the Court required the Government to respond to the following factual questions regarding each of the requested damage assessments. The Government response follows the question.

QUESTIONS:

1. Is each in the possession, custody, or control of military authorities?

Government Response: -

a. Defense Intelligence Agency (DIA) and the Information Review Task Force (IRTF)- Yes, the classified document itself is in the possession of military authorities (DIA); however, the document contains material from other Agencies and Departments outside the control of military authorities. The military controls the document itself, but not all the information within its four corners.

b. Wikileaks Task Force (WTF)- No.

c. Department of State (DOS) -DOS has not completed a damage assessment.

d. Office of the National Counterintelligence Executive (ONCIX)- ONCIX has not produced any interim or final damage assessments in this matter.

2. If no, what agency has custody of each of the damage assessments?

Government Response:

WTF - The Central Intelligence Agency has possession, custody, and control.

3. Does the Prosecution have access to the damage assessments?

Government Response:

a. DIA and IRTF- The prosecution was given limited access for the purpose of reviewing for any discoverable material. The prosecution only has control of the information within the document that is owned by the Department of Defense (military authority).

b. WTF - The prosecution was given very limited access for the purpose of reviewing for preparation of the previous motions hearing. The prosecution will have future access to complete a full review for *Brady* material, as outlined below.

4. Has the Prosecution examined each of the damage assessments for Brady material?

Government Response:

- a. DIA and IRTF- Yes.
- b. WTF -No.

4a. If yes, is there any favorable material?

Government Response:

DIA and IRTF- Yes; however, the United States has only found classified information that is "favorable to [the] accused that is material... to punishment." *Cone v. Bell*, 129 S.Ct. 1769, 1772 (2009); see also *Brady v. Maryland*, 373 U.S. 83, 87 (1973). The United States has not found any favorable material relevant to findings.

4b. If no, why not?

Government Response:

WTF- The prosecution has only conducted a cursory review of the damage assessment in order to understand what information exists within the Agency, and has not conducted a detailed review for *Brady* material. This process is ongoing and the prosecution will produce all "evidence favorable to [the] accused that is material to guilt or to punishment[]" if it exists, under the procedures outlined in MRE 505, *Cone v. Bell*, 129 S.Ct. at 1772; see also *Brady v. Maryland*, 373 U.S. at 87. Additionally, the United States is concurrently working with other Federal Organizations which we have a good faith basis to believe may possess damage assessments or impact statements, and will make such discoverable information available to the defense under MRE 505.

END OF QUESTIONS

7. No head of an executive or military department or government agency concerned has claimed a privilege to withhold classified information IAW MRE 505(c).

The Law:

1. Defense discovery in the military justice system is governed by the Constitutional standards set forth by the Supreme Court in *Brady v. Maryland*, 373 U.S. 83 (1963) and recently reaffirmed in *Smith v. Cain*, (slip opinion 10 January 2012), Article 46, UCMJ (Opportunity to Obtain Witnesses and Other Evidence), RCM 701 (Discovery), and, also, by RCM 703 (Production of Evidence) when the requested discovery is evidence not under the control of military authorities. For classified information, where the Government voluntarily agrees to disclose classified information in whole or in limited part to the accused, the provisions of MRE 505(g) apply. Where the Government seeks to use MRE 505 to withhold classified information, a privilege must be claimed IAW MRE 505(c). *U.S. v. Schmidt*, 60 M.J. 1 (C.A.A.F. 2004).

2. *Brady* requires the Government to disclose evidence that is favorable to the defense and material to guilt or punishment. Favorable evidence is exculpatory and impeachment evidence. *Brady* applies to classified information. The Government must either disclose evidence that is favorable to the defense and material to guilt or punishment, seek limited disclosure IAW MRE 505(g)(2), or invoke the privilege for classified information under MRE 505(c) and follow the procedures under MRE 505(f) and (i). The classified information privilege under MRE 505 does not negate the Government's duty to disclose information favorable to the defense and material to punishment under *Brady*. The Government may provide the information to the Court and move for limited disclosure IAW MRE 505(g)(2). If the privilege is claimed, MRE 505(i) allows the Government to propose alternatives to full disclosure.¹

3. Trial Counsel have a due diligence duty to review the files of others acting on the Government's behalf in the case for favorable evidence material to guilt or punishment. The scope of *Brady* due diligence is to examine files beyond the Trial Counsel's files is limited to:

(1) the files of law enforcement authorities that have participated in the investigation of the subject matter of the charged offense;

(2) investigative files in a related case maintained by an entity closely aligned with the prosecution; and

(3) other files, as designated in a defense discovery request, that involved a specified type of information within a specified entity.

For relevant files known to be under the control of another governmental entity, Trial Counsel must make that fact known to the Defense and engage in good faith efforts to obtain the material. *U.S. v. Williams*, 50 M.J. 436 (C.A.A.F. 1999).

4. Article 46, UCMJ (Opportunity to obtain witnesses and other evidence) provides in relevant part that trial counsel, defense counsel and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe.

5. The President promulgated RCM 701 to govern discovery and RCM 703 to govern evidence production. The rules work together when production of evidence not in the control of military authorities is relevant and necessary for discovery. *U.S. v. Graner*, 69 MJ 104 (C.A.A.F. 2010). The requirements for discovery and production of evidence are the same for classified and unclassified information under RCM 701 and 703 unless the Government moves for limited disclosure under MRE 505(g)(2) or claims the MRE 505 privilege for classified information. If the Government voluntarily discloses classified information to the defense, the protective order and limited disclosure provisions of MRE 505(g) apply. If, after referral, the Government invokes the classified information privilege, the procedures of MRE 505(f) and (i) apply.

¹ The parties have not presented the Court with any military cases directly on point. *Cone v. Bell*, 556 U.S. 449 (2009) does not address classified information disclosures required by the Government under *Brady*. Federal courts using the Classified Information Procedures Act (CIPA) recognize that *Brady* requires disclosure of evidence by the prosecution when it is both favorable to the accused and material either to guilt or punishment. See *U.S. v. Hanna*, 661 F.3d 271 (6th Cir. 2011).

6. Relevant discovery rules in RCM 701(Discovery) are:

a. RCM 701(a)(2) (Documents, tangible objects, reports) governs defense requested discovery of evidence material to the preparation of the defense that is within the possession, custody, or control of military authorities, whose existence is known or by due diligence should be known by the Trial Counsel. The rule provides for such discovery after service of charges upon the accused.

b. RCM 701(a)(6) (Evidence favorable to the defense) codifies *Brady* and provides that the trial counsel shall, as soon as practicable, disclose to the defense the existence of evidence known to the trial counsel which reasonably tends to: (A) negate the guilt of the accused to an offense charged; (B) reduce the degree of guilt of the accused of an offense charged; or (C) reduce the punishment.

c. RCM 701(f) provides that nothing in RCM 701 shall be construed to require the disclosure of information protected from disclosure by the Military Rules of Evidence. RCM 701(f) applies to discovery of classified information when the Government moves for limited disclosure under MRE 505(g)(2) of classified information subject to discovery IAW RCM 701 or when the Government claims a privilege under MRE 505(c) for classified information.

d. RCM 701(g) authorizes the military judge to regulate discovery. A military judge is not detailed to a court-martial until charges are referred for trial (Article 26(a) UCMJ).

7. RCM 703 (Production of Witnesses and Evidence) states in relevant part:

a. RCM 703(f)(1) provides that each party is entitled to the production of evidence which is relevant and necessary.

b. RCM 703(f)(4) provides that evidence under the control of the government may be obtained by notifying the custodian of the record of the time, place, and date the evidence is required and requesting the custodian to send or deliver the evidence. The custodian of the evidence may request relief on the grounds that the order of production is unreasonable or oppressive. After referral, the military judge may direct that the subpoena or order of production be withdrawn or modified. Subject to MRE 505 (Classified Evidence), the military judge may direct that the evidence be submitted for an *in camera* inspection in order to determine whether relief should be granted.

8. Both the discovery rules under RCM 701 and the evidence production rules under RCM 703 are grounded in relevance. In order to have the military judge compel release of evidence either as discovery under RCM 701 or as evidence production under RCM 703, the Defense must establish that the evidence is relevant either to the merits or to sentencing, *U.S. v. Graner*, 69 MJ 104 (C.A.A.F. 2010).

9. Prior to referral, the Government may decline to disclose information requested by the Defense IAW RCM 701 where the Government contests relevance and materiality. After referral, RCM 701(g) empowers the military judge to deny or regulate discovery to include

requiring the Government to produce the requested discovery for *in camera* review. RCM 701(g) does not require the Government to produce all discovery requested by the Defense to the Court for *in camera* review. As in this case, where the Government withholds discovery, the Defense may move for a Motion for Appropriate Relief to Compel Discovery IAW RCM 906(b)(7) and, where classified information is withheld by the Government, IAW MRE 505(d). Upon such a motion and a sufficient showing by the Defense of relevance and materiality, the Court may require the evidence to be produced for *in camera* review.

10. If classified discovery is at issue and the government agrees to disclose classified information to the defense, the military judge shall enter an appropriate protective order if the government requests one IAW MRE 505(g)(1) or allow the Government to move for limited disclosure under MRE 505(g)(2).

11. If classified discovery detrimental to national security is at issue and the government does not wish to disclose the classified information in part or in whole to the defense, the government must claim a privilege under MRE 505(c). There is no privilege under MRE 505 for classified information unless the privilege is claimed by the head of the executive or military department or government agency concerned based on a finding that the information is properly classified and that disclosure would be detrimental to the national security.

12. MRE 505(e) (Pretrial Session) states in relevant part that after referral and prior to arraignment any party may move for a session under Article 39(a) to consider matters relating to classified information in connection with the trial. Following such a motion or *sua sponte* the military judge promptly shall hold a session to establish the timing of requests for discovery, the provision of notice under MRE 505(h), and the initiation of procedures under MRE 505(i). In addition the military judge may consider any matters that relate to classified information or that may promote a fair and expeditious trial.

Analysis:

1. No government entity in possession of any discovery at issue has claimed a privilege under MRE 505(c). Thus, *Brady*, RCM 701(a)(2), 701(a)(6), and 701(g) govern discovery of both classified and unclassified information. MRE 505(g) also applies when the Government voluntarily discloses classified information. RCM 703(f) requires that discovery of evidence outside the control of military authorities be relevant and necessary.

2. The 14 hard drives for which the EnCase Images are requested are within the possession, custody, or control of military authorities. Some of the information in the IRFT damage assessment is under the possession, custody, or control of military authorities. The DOS and WTF damage assessments are in the possession, custody, and control of the Department of State and the Central Intelligence Agency, respectively.

3. Because no privilege has been invoked under MRE 505(c) and the Government has not moved for limited disclosure IAW RCM 505(g)(2), RCM 701(f) does not preclude disclosure of classified information that is material to the preparation of the defense under RCM 701(a)(2) or classified information that is favorable to the defense under RCM 701(a)(6).

4. Under Brady and RCM 701(a)(6), the Government has a due diligence duty to search for evidence that is favorable to the defense and material to guilt or punishment. This includes a due diligence to search any damage assessment pertaining to the alleged leaks in this case made by the CIA, DoD, DOJ, and DOS. These agencies are entities closely aligned with the prosecution in this case. The Government must disclose any favorable classified information from the damage assessments that is material to punishment, move for limited disclosure under MRE 505(g)(2), or claim the privilege IAW MRE 505(c).

5. The Government has examined the IRTF damage assessment and has found information favorable to the accused that is material to punishment. The Court further finds that the IRTF damage assessment is relevant and necessary for discovery under *Brady* and RCM 701(a)(6).

6. The Court finds that the WTF and DOS damage assessments may contain evidence favorable to the accused that is material to punishment. The Court finds that these damage assessments are relevant and necessary for the Government to examine for *Brady* material.

7. The Court finds all 3 damage assessments relevant and necessary for the Court to conduct an *in camera* review to determine whether they contain information that is favorable to the accused and material to punishment under *Brady*, whether they contain information relevant and favorable to the accused under RCM 701(a)(6), and whether they contain information material to the preparation of the defense under RCM 701(a)(2).

8. The Government has advised the Court it is "unaware" of any forensic results or investigative files relevant to this case maintained by DOS, FBI, DIA, ONCIX, and CIA. These agencies are closely aligned to the Government in this case. The Government has a due diligence duty to determine whether such forensic results or investigative files that are germane to this case are maintained by these agencies. The Government will advise the Court whether they have contacted DOS, FBI, DIA, ONCIX, and CIA and that each of these agencies have stated to the government that no such forensic results or investigative files exist.


9. The Court finds that a complete search of the relevant 14 hard-drives of computers from the Tactical Sensitive Compartmented Information Facility (T-SCIF) and the Tactical Operations Center (TOC) of Headquarters and Headquarters Company (HHC), 2nd Brigade Combat Team (BCT), 10th Mountain Division, Forward Operating Base (FOB) Hammer, Iraq is not material to the preparation of the defense for specifications 2 and 3 of Charge III IAW RCM 701(a)(2). At least some of the information on the hard drives is classified. The witnesses at the Article 32 investigation testified that Soldiers would save unauthorized music, movies, games, and other programs such as Google Earth and M-IRC Chat. The Defense has evidence from the Article 32 witnesses to further the defense theory. Although a complete search is not material, the Court will direct the Government to search each of the 14 hard drives Wget, M-IRC Chat, Google Earth, movies, games, music, and any other specifically requested program from the Defense. The Government will disclose the results of the search to the Defense under MRE 701(g)(1) and 505(g)(2). The Defense may renew its Motion to Compel Encase Forensic Images after receipt of the results of the Government search.

RULING: The Defense Motion to Compel Discovery is **Granted in Part**.

ORDER:

1. The Government will **immediately** begin the process of producing the damage assessments that are outside the possession, custody, or control of military authorities IAW RCM 703(f)(4)(A). If necessary, the Government shall prepare an order for the Court to sign for each custodian.
2. The Government will **immediately** cause an inspection of the 14 hard drives as provided in paragraph (Analysis 9) above. On or before **30 March 2012**, Defense will provide a list of additional terms the Defense wants the Government to add to its search of the 14 hard drives. On or before **20 April 2012**, the Government will provide the results of the search.
3. The Government shall contact DOS, FBI, DIA, ONCIX, and CIA to determine whether these agencies contain any forensic results or investigative files relevant to this case. The Government will notify the court NLT **20 April 2012** whether any such files exist. If they do exist, the Government will examine them for evidence that is favorable to the accused and material to either guilt or punishment.
4. By **20 April 2012** the Government will notify the Court with a status of whether it anticipates any government entity that is the custodian of classified evidence that is the subject of the Defense Motion to Compel will seek limited disclosure IAW MRE 505(g)(2) or claim a privilege IAW MRE 505(c) for the classification under that agency's control.
5. By **18 May 2012** the Government will disclose any unclassified information from the 3 damage assessments that is favorable to the accused and material to guilt or punishment and provide any additional unclassified information from the damage assessments to the Court for in camera review IAW RCM 701(g)(2).
6. By **18 May 2012** the Government will identify what classified information from the 3 damage reports it found that was favorable to the accused and material to guilt or punishment. By **18 May 2012** the Government will disclose all classified information from the 3 damage assessments to the Court for *in camera* review IAW RCM 701(g)(2) or, at the request of the Government, *in camera* review for limited disclosure under MRE 505(g)(2). By **18 May 2012**, if the relevant Government agency claims a privilege under MRE 505(c) and the Government seeks an *in camera* proceeding under MRE 505(i), the Government will move for an *in camera* proceeding IAW MRE 505(i)(2) and (3) and provide notice to the Defense under MRE 505(i)(4)(A).

So **ORDERED:** this 23rd day of March 2012.


DENISE R. LIND
COL, JA
Chief Judge, 1st Judicial Circuit

UNITED STATES OF AMERICA)

v.)

Manning, Bradley E.
PFC, U.S. Army,
HHC, U.S. Army Garrison,
Joint Base Myer-Henderson Hall
Fort Myer, Virginia 22211

Prosecution Request

for Leave to Respond to
Portions of the Court Order
until 2 May 2012

13 April 2012

1. The United States requests leave of the Court to respond to a portion of paragraph 4 of the Court's 23 March 2012 Judicial Order (hereinafter "Court Order") until 2 May 2012, which requires the United States to notify the Court whether the Central Intelligence Agency (CIA), through trial counsel, will seek limited disclosure under MRE 505(g)(2) or claim a privilege under MRE 505(c) of any classified "forensic results or investigative files relevant to this case" by 20 April 2012.
2. In compliance with paragraph 3 of the Court Order, the United States immediately began the process of determining whether CIA has "forensic results or investigative files relevant to this case" and examined them for evidence that is potentially discoverable. On 11 April 2012, the United States identified certain information and requested the authority to release the information to the defense. The CIA is currently reviewing the information to obtain the necessary approvals to either: (1) release the classified information in its original form; (2) provide the documents for a limited disclosure under MRE 505(g)(2); or (3) to invoke the classified information privilege under MRE 505(c).
3. The CIA advised the United States that they will need additional time to make this determination. The CIA has also advised that although they need additional time to make the above decision, they do not expect to require any additional time in order to meet the Court's disclosure suspense of 18 May 2012, regardless of their decision listed above.
4. The prosecution's request will not necessitate any delay in the proceedings or delay in responding to the defense. The prosecution does not anticipate requesting leave in responding by 18 May 2012. As such, there will be no prejudice to the defense.



ASHDEN FEIN
MAJ, JA
Trial Counsel

UNITED STATES


y.

MANNING, Bradley E., PFC
U.S. Army, xxx-xx-[REDACTED]
Headquarters and Headquarters Company,
U.S. Army Garrison, Joint Base Myer-
Henderson Hall, Fort Myer, VA 22211

**RULING:
LEAVE TO RESPOND
UNTIL 2 MAY 2012**

DATED: 16 April 2012

The Government motion is **GRANTED**.


DENISE R. LIND
COL, JA
Chief Judge, 1st Judicial Circuit

Williams, Patricia CIV JFHQ-NCR/MDW SJA

From: Lind, Denise R COL USARMY (US) [denise.r.lind.mil@mail.mil]
Sent: Tuesday, April 17, 2012 2:00 PM
To: Fein, Ashden MAJ USA JFHQ-NCR/MDW SJA
Cc: coombs@armycourtmarshaldefense.com; Ford, Arthur D. CW2 USA JFHQ-NCR/MDW SJA; Tooman, Joshua J CPT USARMY (US); Santiago, Melissa S CW2 USARMY (US); Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA; Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA; VonElten, Alexander S. 1LT USA JFHQ-NCR/MDW SJA; Jefferson, DaShawn MSG MIL USA OTJAG; Williams, Patricia CIV JFHQ-NCR/MDW SJA
Subject: US v. PFC BM - Ruling on Gov't Request - Leave to Respond; Article 39(a); and trial calendar (UNCLASSIFIED)
Attachments: 120413-Motion for Leave.pdf; document2012-04-16-145110.pdf; Draft Update Calendar final16 April 12.docx
Signed By: denise.lind@us.army.mil

Classification: UNCLASSIFIED

Caveats: NONE

Counsel,

1. Attached please find the Court's ruling granting the Government motion for Leave to Respond. The original motion is also attached. I will try to add the ruling to the FTP to see how it works. Ms. Williams, please add the motion and ruling as the next AE in line (do not add the draft calendar discussed in (3) below).
2. For the Article 39(a) session starting Tues, 24 April, we will meet in chambers for an RCM 802 conference at 0900 and go on the record at 1000. I would like to handle all of the outstanding discovery issues on Tuesday. Both sides have advised me that there will be witnesses - forensics POCs for the hard drive issue, and state department POC for the damage assessment issue. Please confer and confirm that all witnesses/evidence for discovery issues will be available Tuesday.
3. Case calendar. I have the parties' input on the case calendar. Tuesday afternoon, we will meet in chambers to finalize it (subject to review every 30 days). Please review the attached (very rough) draft as a baseline with trial scheduled 20 September - 15 October 2012. Certain motions that do not involve classified information are moved up in the schedule (article 13 and speedy trial to July) and classified/unclassified issues are not severed in the Article 39(a) sessions. We currently have "replies" built in to the calendar. They shouldn't be necessary for motions addressed shortly before trial per the draft schedule.

D

Denise R. Lind
COL, JA
Chief Judge, 1st Judicial Circuit

-----Original Message-----

From: Fein, Ashden MAJ USA JFHQ-NCR/MDW SJA

[\[mailto:Ashden.Fein@jfhqncr.northcom.mil\]](mailto:Ashden.Fein@jfhqncr.northcom.mil)

Sent: Thursday, April 12, 2012 9:37 PM

To: Lind, Denise R COL USARMY (US)

Cc: coombs@armycourt martialdefense.com; Ford, Arthur D Jr CW2 USARMY (US); Tooman, Joshua J CPT USARMY (US); Santiago, Melissa S CW2 USARMY (US); Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Overgaard, Angel M CPT USARMY (US); Whyte, Jeffrey H CPT USARMY (US); VonElten, Alexander S. 1LT USA JFHQ-NCR/MDW SJA; Jefferson, Dashawn MSG USARMY (US); Williams, Patricia A CIV (US)

Subject: US v. PFC BM

Ma'am,

Attached are the following documents:

1. Government's Proposed Case Calendar
2. Government's Response to Dismiss all Charges
3. Government Response to Dismiss Specification 1 of Charge II
4. Government Response to Motion to Dismiss Article 104
5. Government Response to UMC Motion

As for the defense's motion to renew its motion to compel discovery of computers, the United States relies on its response to the defense's

original motion, the record during the motions hearing, the Court's ruling, and the RCM 802 conference.

Additionally, we FEDEXed the Court and defense the audio recordings along with FTR Gold Player and it should arrive tomorrow. Finally, the government added 1LT Alec VonElten to the email. He is now detailed to the case but as of today he will not go on the record.

v/r

MAJ Fein

Classification: UNCLASSIFIED

Caveats: NONE

UNITED STATES

 \mathbf{y}_i

MANNING, Bradley E., PFC
U.S. Army, xxx-xx- [REDACTED]
Headquarters and Headquarters Company,
U.S. Army Garrison, Joint Base Myer-
Henderson Hall, Fort Myer, VA 22211

**INTERIM ORDER:
GOVERNMENT REQUEST FOR
LEAVE TO FILE PROTECTIVE
ORDER(S)**

DATED: 28 March 2012

1. At an RCM 802 conference after the Article 39(a) session on 16 March 2012, the Defense advised the Government and the Court of its intent to publish (without enclosures) Defense filings and proposed filings with the Court on the internet. The Government, via email dated 23 March 2012, 1733, advised the Court that the Government opposes internet publication of such Defense filings. The Government further requested that, prior to any internet publication of a Court filing or proposed filing by the Defense, the Government have:

1. an opportunity to file a motion for a protective order or multiple protective orders under RCM 701(g) and RCM 806(d); and
 2. 30 days to receive input from all different federal entities on what discovery information such agencies did not intend to be publicly available.
2. The Defense via email dated 23 March 2012, 1745 and 1803 advised the Government of its intent to publish on the internet all previous Defense filings with the Court (without enclosures) and proposed Defense filings for the next Article 39(a) session (24-26 April 2012) unless subject to a protective order by the Court. (The emails are attached to this order as Attachment A.)
3. A pleading is “filed” with the Court when it is identified as an exhibit on the record at an Article 39(a) session. Pleadings served on the opposing party that have not been identified on the record at an Article 39(a) session are “proposed filings”.
4. This Interim Order is issued IAW MRE 505(g) and (h), MRE 506(g) and (h), RCM 701(g) and RCM 806(d), and *Seattle Times v. Rhinehart*, 104 S.Ct. 2199 (1984). This Interim Order provides procedures for the Government to request protective order(s) prior to any public release of Defense Court filings or proposed filings. The Court finds this Interim Order necessary under the above authorities. The Government has provided the Defense both classified information and government information subject to protective order under MRE 505(g)(1) and MRE 506(g). This Court has issued a protective order for classified information provided to the Defense in discovery. (Protective orders are attached at Appendix B). The Defense accepted such

discovery and agreed to comply with the protective orders. There have been two classified information spillage incidents to date in this case.

5. This Interim Order applies to all previous Court filings and any pleadings proposed for Court filing during the Article 39(a) session currently scheduled to be held on 24-26 April 2012.

INTERIM ORDER (IO):

1. The Government request to file a motion for a protective order or multiple protective orders prior to public release of Defense Court filings or proposed Court filings is **GRANTED** as provided below.
2. The Defense will notify the Government of each Defense Court filing or proposed filing intended for public release. Defense will provide the Government with the original filing and the redacted filing intended for public release.
3. Government motions for protective order will:
 - a. address each Defense Court filing or proposed Court filing individually and identify, with particularity, each portion of the filing to which the Government objects to public release and the legal basis for each objection to public release.
 - b. provide proposed findings of fact for the Court with respect to each portion of each filing to which the Government objects to public release.
4. Suspend Dates for Defense Court filings and proposed filings the Defense intends to publicly release:
 - a. Defense Appellate Exhibits filed with the Court to date and proposed Court filings served on the Government on or before **29 March 2012**:
2 April 2012 – Defense notifications to the Government IAW IO paragraph (2);
17 April 2012 - Government objections to public release and motion(s) for protective order providing the Court with information ordered in IO paragraph (3);
20 April 2012 – Defense Response to Government Motions for Protective Order.
 - b. Defense responses to Government motions served on the Government on or before **12 April 2012**:
12 April 2012 - Defense notifications to the Government IAW IO paragraph (2);
17 April 2012 - Government objections to public release and motion(s) for protective order providing the Court with information ordered in IO paragraph (3);
20 April 2012 – Defense Response to Government Motions for Protective Order.
 - c. Defense replies served on the Government on or before **17 April 2012**:

17 April 2012 - Defense notifications to the Government IAW IO paragraph (2);
19 April 2012 - Government objections to public release and motion(s) for protective order providing the Court with information ordered in IO paragraph (3);
20 April 2012 – Defense Response to Government Motions for Protective Order.

5. The Defense will not publicly release any Defense Appellate Exhibit or proposed filing with the Court to which the Government objects until after the Government motions for protective order are addressed at the Article 39(a) session 24-26 April 2012.

6. The Defense will not disclose any information known or believed to be subject to a claim of privilege under MRE 505 or MRE 506 without specific Court authorization. Prior to any disclosure of classified information, the Defense will provide notice under MRE 505(h) and follow the procedures under that rule.

7. Personal identifying information (PII) will be redacted from all Defense filings publicly released. PII includes personal addresses, telephone numbers, email addresses, first 5 digits of social security numbers, dates of birth, financial account numbers, and the names of minors.

8. To protect the safety of potential witnesses all persons who are not parties to the trial shall be referenced by initials of first and last name in any Defense filing publicly released.

9. For future Defense filings with the Court where the Government moves for a protective order preventing public release, the Court proposes the procedures in the draft protective order at Attachment C. Objections to the proposed procedures will be addressed at the Article 39(a) session 24-26 April 2012.

So **ORDERED**: this 28th day of March 2012.



DENISE R. LIND
COL, JA
Chief Judge, 1st Judicial Circuit

Waybright, Daniel W. SGT USA JFHQ-NCR/MDW SJA

From: David Coombs [coombs@armycourtartialdefense.com]
Sent: Friday, March 23, 2012 6:03 PM
To: Lind, Denise R COL USARMY (US)
Cc: Kemkes, Matthew J MAJ USARMY (US); Bouchard, Paul R CPT USARMY (US); Santiago, Melissa S CW2 USARMY (US); 'Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA'; Overgaard, Angel M CPT USARMY (US); Whyte, Jeffrey H CPT USARMY (US); Ford, Arthur D Jr CW2 USARMY (US); ashden.fein@us.army.mil; Prather, Jay R CIV (US); Williams, Patricia A CIV (US); Fein, Ashden MAJ USARMY (US)
Subject: RE: Defense's Release of Court Filings (UNCLASSIFIED)

Ma'am,

Just to be clear, the Defense does not intend to publish any attachments; thus, the concerns about discovery are unwarranted. We request that this issue be resolved in a timely manner, as we would like to make public our filings for the next Article 39(a).

v/r
David

David E. Coombs, Esq.
Law Office of David E. Coombs
11 South Angell Street, #317
Providence, RI 02906
Toll Free: 1-800-588-4156
Local: (508) 689-4616
Fax: (508) 689-9282
coombs@armycourtartialdefense.com
www.armycourtartialdefense.com

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-----Original Message-----

From: Lind, Denise R COL USARMY (US) [mailto:denise.r.lind.mil@mail.mil]
Sent: Friday, March 23, 2012 5:52 PM
To: David Coombs
Cc: Kemkes, Matthew J MAJ USARMY (US); Bouchard, Paul R CPT USARMY (US); Santiago, Melissa S CW2 USARMY (US); 'Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA'; Overgaard, Angel M CPT USARMY (US); Whyte, Jeffrey H CPT USARMY (US); Ford, Arthur D Jr CW2 USARMY (US); ashden.fein@us.army.mil; Prather, Jay R CIV (US); Williams, Patricia A CIV (US); Fein, Ashden MAJ USARMY (US)
Subject: RE: Defense's Release of Court Filings (UNCLASSIFIED)

Classification: UNCLASSIFIED
Caveats: NONE

Counsel,

Do not publish any filings on the internet until I have had an opportunity to consider the position of the parties.

D

Denise R. Lind
COL, JA
Chief Judge, 1st Judicial Circuit

-----Original Message-----

From: David Coombs [mailto:coombs@armycourt martialdefense.com]
Sent: Friday, March 23, 2012 5:45 PM
To: Lind, Denise R COL USARMY (US)
Cc: Kemkes, Matthew J MAJ USARMY (US); Bouchard, Paul R CPT USARMY (US); Santiago, Melissa S CW2 USARMY (US); 'Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA'; Overgaard, Angel M CPT USARMY (US); Whyte, Jeffrey H CPT USARMY (US); Ford, Arthur D Jr CW2 USARMY (US); ashden.fein@us.army.mil; Prather, Jay R CIV (US); Williams, Patricia A CIV (US); Fein, Ashden MAJ USARMY (US)
Subject: RE: Defense's Release of Court Filings

Ma'am,

The proceedings have not been sufficiently open and transparent, as evidenced by this second letter that has been sent by the Center for Constitutional Rights regarding these proceedings. The Defense does not concur with the Government's dire predictions. In Federal cases that involve classified information (such as the recent Drake case), the pleadings are always publicized.

The Defense intends to publish its motions starting on Monday, unless subject to a gag order. With regards to future motions, the Defense intends to publish its motions a few days after filing so as to ensure that there is no inadvertent spillage.

v/r
David

David E. Coombs, Esq.
Law Office of David E. Coombs
11 South Angell Street, #317
Providence, RI 02906
Toll Free: 1-800-588-4156
Local: (508) 689-4616
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www.armycourt martialdefense.com

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-----Original Message-----

From: Fein, Ashden MAJ USA JFHQ-NCR/MDW SJA [mailto:Ashden.Fein@jhqncr.northcom.mil]
Sent: Friday, March 23, 2012 5:33 PM
To: Lind, Denise R COL USARMY (US)
Cc: David Coombs; Matthew kemkes; Bouchard, Paul R CPT USARMY (US); Santiago, Melissa S CW2 USARMY (US); Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA; Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA; Ford, Arthur D. CW2 USA JFHQ-NCR/MDW SJA; ashden.fein@us.army.mil; Prather, Jay R CIV (US); Williams, Patricia CIV JFHQ-NCR/MDW SJA
Subject: Defense's Release of Court Filings

Ma'am,

The United States opposes the defense's request to freely publish all motions, responses, and replies on the Internet. The defense's request would act to publicize information provided to the defense in discovery, the public disclosure of which may require outside agency approval and the substance of which may cause irreparable prejudice to the United States. Much of the information in this case was disclosed under various protective orders which remain in effect, including grand jury subpoena information, Secretary of the Army 15-6 investigation information, and law enforcement sensitive information. This protected information was provided to the defense for discovery and under the specific condition not to publish or release it outside of the specific individuals who were allowed access to the information.

The defense purports that it wants to publish this information online to keep the public informed of the proceeding. The public, however, is already well informed of the proceedings. The public was present at the Article 32 hearing, the arraignment, and the first motions hearing, and will continue to be present at all open portions of the motions hearings and the trial.

The command provided the theater next door for overflow area so that the public can freely watch the proceedings and the media operations center for the media. Additionally, other than the electronic filing process, the military justice system is more open than the federal system from the Article 32 proceedings through the end of the trial.

The United States does not intend to publish its pleadings online. If the defense remains intent on publishing all pleadings and their enclosures online, the United States requests the opportunity to file a motion for a protective order or multiple protective orders under RCM 701(g)(2) and

806(d) for the Court to regulate the defense's use of information gained through discovery. Additionally the United States requests the Court allow the prosecution thirty days to receive input from all the different federal entities on what information they provided for discovery which they did not intend to be made publically available. The sole purpose of discovery is to prepare for trial. Motions are filed to shape legal issues and belong to the Court. Most motions, e.g., motions to suppress or exclude evidence or testimony, are not appropriate for publication. Freely publicizing all pleadings, at this stage of the proceedings, may undermine the effectiveness of the publicity order and will circumvent those measures adopted to regulate what is available to the public and significantly jeopardize many interests of the United States, to include, protecting classified information (in the case of a spillage), preserving the confidentiality of law enforcement information, preventing potential witnesses from receiving information outside the scope of their projected testimony, protecting testifying witnesses, protecting trial participant safety, protecting the personal information of potential panel members, preventing disclosure of government information that threatens national security and is unclassified, and the deliberative processes of the United States Government. Furthermore, the United States believes that the defense's intended course of action would result in a substantial likelihood of materially prejudicing the proceeding, in violation of, inter alia, RCM 806(d) and Army Regulation 27-26, specifically Rule 3.6.

v/r
MAJ Fein

Classification: UNCLASSIFIED
Caveats: NONE

IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES

v.

MANNING, Bradley E., PFC
U.S. Army, xxx-xx-
Headquarters and Headquarters Company,
U.S. Army Garrison, Joint Base Myer-
Henderson Hall, Fort Myer, VA 22211

)
)
) **DRAFT ORDER:**
) **GOVERNMENT MOTION:**
) **PROTECTIVE ORDER(S)**

)
)
)
)
)
) **DATED:**

1. This Order applies when the Defense proposes to publicly release Defense Court filings or proposed filings.
2. A pleading is "filed" with the Court when it is identified as an exhibit on the record at an Article 39(a) session. Pleadings served on the opposing party that have not been identified on the record at an Article 39(a) session are "proposed filings".
3. This Order is issued IAW MRE 505(g) and (h), MRE 506(g) and (h), RCM 701(g) and RCM 806(d), and *Seattle Times v. Rhinehart*, 104 S.Ct. 2199 (1984). The Order provides procedures for the Government to request protective order(s) prior to any public release of Defense Court filings or proposed filings. The Court finds this Order necessary under the above authorities. The Government has provided the Defense both classified information and government information subject to protective order under MRE 505(g)(1) and MRE 506(g). This Court has issued a protective order for classified information provided to the Defense in discovery. The Defense accepted such discovery and agreed to comply with the protective orders. There have been two classified information spillage incidents to date in this case.
4. This Order supplements the Interim Order issued by the Court on 28 March 2012.

ORDER:

1. The Defense will notify the Government of each Defense Court filing or proposed filing intended for public release. Defense will provide the Government with the original filing and the redacted filing intended for public release.
2. Government motions for protective order will:
 - a. address each Defense Court filing or proposed Court filing individually and identify, with particularity, each portion of the filing to which the Government objects to public release and the legal basis for each objection to public release.

b. provide proposed findings of fact for the Court with respect to each portion of each filing to which the Government objects to public release.

3. **Suspense Dates for Defense Court filings and proposed filings the Defense intends to publicly release.** The Court is currently scheduling Article 39(a) sessions with the following schedule: 2 weeks to file motions; 2 weeks to file responses; 5 days to file replies.

a. **NLT the scheduled filing date for motions, responses, or reply for each Article 39(a) session, the Defense shall provide the Government notice IAW paragraph (1) of this Order.**

b. **The Government shall provide the Court with information ordered in paragraph (2) of this Order NLT:**

1. **the scheduled filing date for responses for Defense motions;**
2. **the scheduled filing date for replies for Defense responses; and**
3. **3 days after filing of Defense replies.**

The Court will grant motions for continuance for good cause.

4. **The Defense will not publicly release any Defense Appellate Exhibit or proposed filing with the Court to which the Government objects until after the Government motion(s) for protective order are addressed at the next scheduled Article 39(a) session.**

5. **The Defense will not disclose any information known or believed to be subject to a claim of privilege under MRE 505 or MRE 506 without specific Court authorization. Prior to any disclosure of classified information, the Defense will provide notice under MRE 505(h) and follow the procedures under that rule.**

6. **Personal identifying information (PII) will be redacted from all Defense filings publicly released. PII includes personal addresses, telephone numbers, email addresses, first 5 digits of social security numbers, dates of birth, financial account numbers, and the names of minors.**

7. **To protect the safety of potential witnesses all persons who are not parties to the trial shall be referenced by initials of first and last name in any Defense filing publicly released.**

So ORDERED: this ____ day of March 2012.

DENISE R. LIND
COL, JA
Chief Judge, 1st Judicial Circuit

From: Fein, Ashden MAJ USA JFHQ-NCR/MDW SJA
To: Lind, Denise R COL USARMY (US)
Cc: Kemkes, Matthew J MAJ USARMY (US); Bouchard, Paul R CPT USARMY (US); Santiago, Melissa S CW2 USARMY (US); Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Overgaard, Angel M, CPT USA JFHQ-NCR/MDW SJA; David Coombs; Whyte, Jeffrey H, CPT USA JFHQ-NCR/MDW SJA; Ford, Arthur D, CW2 USA JFHQ-NCR/MDW SJA; Prather, Jay R CIV (US); Williams, Patricia CIV JFHQ-NCR/MDW SJA
Bcc: Bradley, Princeton L, SGT USA JFHQ-NCR/MDW SJA; Feito, Beatriz SGT USA JFHQ-NCR/MDW SJA; Parra, Jairo A, WO1 USA JFHQ-NCR/MDW SJA; Waybright, Daniel W, SGT USA JFHQ-NCR/MDW SJA; Haberland, John CPT USA Regimental Judge Advocate
Subject: [REDACTED]
Date: Tuesday, March 27, 2012 6:14:00 PM
Attachments: 110622-SPCMCA Protective Order for SecArmy 15-6.pdf
110622-SPCMCA Protective Order for SecArmy 15-6 (Coombs).pdf
110622-SPCMCA Protective Order for LFS Information.pdf
110622-SPCMCA Protective Order for LFS Information (Coombs).pdf
100917-SPCMCA Protective Order for Classified Information.pdf
100917-SPCMCA Protective Order for Classified Information (Coombs).pdf
100728-GCMCA Protective Order.pdf

Ma'am,

The government is sending you three emails with attached protective orders.

This email contains all the military protective orders in place prior to referral and an example of their acknowledgments.

v/r
MAJ Fein

-----Original Message-----

From: Lind, Denise R COL USARMY (US) [mailto:denise.r.lind.mil@mail.mil]
Sent: Tuesday, March 27, 2012 3:42 PM
To: Fein, Ashden MAJ USA JFHQ-NCR/MDW SJA; David Coombs
Cc: Kemkes, Matthew J MAJ USARMY (US); Bouchard, Paul R CPT USARMY (US); Santiago, Melissa S CW2 USARMY (US); Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Overgaard, Angel M, CPT USA JFHQ-NCR/MDW SJA; Whyte, Jeffrey H, CPT USA JFHQ-NCR/MDW SJA; Ford, Arthur D, CW2 USA JFHQ-NCR/MDW SJA; Prather, Jay R CIV (US); Williams, Patricia CIV JFHQ-NCR/MDW SJA
Subject: Protective Orders (UNCLASSIFIED)

Classification: UNCLASSIFIED

Caveats: NONE

Counsel,

Trial counsel, by COB today, provide the Court with a copy of all protective orders issued to the defense prior to referral regarding defense discovery.

Thank you,
D

Denise R. Lind
COL, JA
Chief Judge, 1st Judicial Circuit

-----Original Message-----

From: Fein, Ashden MAJ USA JFHQ-NCR/MDW SJA

[mailto:Ashden.Fein@jfhqncr.northcom.mil]

Sent: Monday, March 26, 2012 9:56 AM

To: Lind, Denise R COL USARMY (US); David Coombs

Cc: Kemkes, Matthew J MAJ USARMY (US); Bouchard, Paul R CPT USARMY (US);

Santiago, Melissa S CW2 USARMY (US); Morrow III, JoDean, CPT USA

JFHQ-NCR/MDW SJA; Overgaard, Angel M CPT USARMY (US); Whyte, Jeffrey H CPT

USARMY (US); Ford, Arthur D Jr CW2 USARMY (US); Prather, Jay R CIV (US);

Williams, Patricia A CIV (US)

Subject: RE: Defense's Release of Court Filings (UNCLASSIFIED)

Ma'am,

The teleconference bridge is reserved for 2 hours on 28 March 2012
(1300-1500).

The dial-in instructions are:

-LOCAL: 703-695-4042

-DSN: 255-4042

-LONG DISTANCE: 1-866-283-3879

Note: When you dial, you will be asked to input this PASSCODE: "183603".

Afterwards, dial the # key to join the conference call. The line will
beready 5 minutes prior to start of teleconference.

v/r

MAJ Fein

-----Original Message-----

From: Lind, Denise R COL USARMY (US) [mailto:denise.r.lind@mail.mil]

Sent: Monday, March 26, 2012 9:54 AM

To: Fein, Ashden MAJ USA JFHQ-NCR/MDW SJA; David Coombs

Cc: Matthew kemkes; Bouchard, Paul R CPT USARMY (US); Santiago, Melissa S

CW2 USARMY (US); Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Overgaard,

Angel M. CPT USA JFHQ-NCR/MDW SJA; Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW

SJA; Ford, Arthur D. CW2 USA JFHQ-NCR/MDW SJA; ashden.fein@us.army.mil;

Prather, Jay R CIV (US); Williams, Patricia CIV JFHQ-NCR/MDW SJA

Subject: RE: Defense's Release of Court Filings (UNCLASSIFIED)

Classification: UNCLASSIFIED

Caveats: NONE

Counsel,

1300 on 28 March 2012 is fine.

D

Denise R. Lind

COL, JA

Chief Judge, 1st Judicial Circuit

-----Original Message-----

From: Fein, Ashden MAJ USA JFHQ-NCR/MDW SJA

[mailto:Ashden.Fein@jfhqncr.northcom.mil]

Sent: Monday, March 26, 2012 8:33 AM

To: Lind, Denise R COL USARMY (US); David Coombs

Cc: Kemkes, Matthew J MAJ USARMY (US); Bouchard, Paul R CPT USARMY (US);

Santiago, Melissa S CW2 USARMY (US); Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Overgaard, Angel M CPT USARMY (US); Whyte, Jeffrey H CPT USARMY (US); Ford, Arthur D Jr CW2 USARMY (US); ashden.fein@us.army.mil; Prather, Jay R CIV (US); Williams, Patricia A CIV (US)
Subject: RE: Defense's Release of Court Filings (UNCLASSIFIED)

Ma'am,

Both parties recommend 1300 on Wednesday (28 Mar) for the telephonic RCM 802 conference. The United States will establish a 2 hour long bridge.

v/r
MAJ Fein

-----Original Message-----

From: Lind, Denise R COL USARMY (US) [mailto:denise.r.lind.mil@mail.mil]
Sent: Friday, March 23, 2012 6:35 PM
To: David Coombs
Cc: Matthew kemkes; Bouchard, Paul R CPT USARMY (US); Santiago, Melissa S CW2 USARMY (US); Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA; Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA; Ford, Arthur D. CW2 USA JFHQ-NCR/MDW SJA; ashden.fein@us.army.mil; Prather, Jay R CIV (US); Williams, Patricia CIV JFHQ-NCR/MDW SJA; Fein, Ashden MAJ USA JFHQ-NCR/MDW SJA
Subject: RE: Defense's Release of Court Filings (UNCLASSIFIED)

Classification: UNCLASSIFIED
Caveats: NONE

Counsel,

Please confer and schedule a telephonic RCM 802 conference with me Tuesday or Wed after 1000.

Thank you,
D

Denise R. Lind
COL, JA
Chief Judge, 1st Judicial Circuit

-----Original Message-----

From: David Coombs [mailto:coombs@armycourt martialdefense.com]
Sent: Friday, March 23, 2012 6:03 PM
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filings for the next Article 39(a).

v/r
David

David E. Coombs, Esq.
Law Office of David E. Coombs
11 South Angell Street, #317
Providence, RI 02906
Toll Free: 1-800-588-4156
Local: (508) 689-4616
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coombs@armycourt martialdefense.com
www.armycourt martialdefense.com

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COL, JA
Chief Judge, 1st Judicial Circuit

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Prather, Jay R CIV (US); Williams, Patricia A CIV (US); Fein, Ashden MAJ
USARMY (US)
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Ma'am,

The proceedings have not been sufficiently open and transparent, as evidenced by this second letter that has been sent by the Center for Constitutional Rights regarding these proceedings. The Defense does not concur with the Government's dire predictions. In Federal cases that involve classified information (such as the recent Drake case), the pleadings are always publicized.

The Defense intends to publish its motions starting on Monday, unless subject to a gag order. With regards to future motions, the Defense intends to publish its motions a few days after filing so as to ensure that there is no inadvertent spillage.

v/r
David

David E. Coombs, Esq.
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11 South Angell Street, #317
Providence, RI 02906
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-----Original Message-----

From: Fein, Ashden MAJ USA JFHQ-NCR/MDW SJA
[mailto:Ashden.Fein@jfhqncr.northcom.mil]
Sent: Friday, March 23, 2012 5:33 PM
To: Lind, Denise R COL USARMY (US)
Cc: David Coombs; Matthew kemkes; Bouchard, Paul R CPT USARMY (US); Santiago, Melissa S CW2 USARMY (US); Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA; Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA; Ford, Arthur D. CW2 USA JFHQ-NCR/MDW SJA; ashden.fein@us.army.mil; Prather, Jay R CIV (US); Williams, Patricia CIV JFHQ-NCR/MDW SJA
Subject: Defense's Release of Court Filings

Ma'am,

The United States opposes the defense's request to freely publish all motions, responses, and replies on the Internet. The defense's request would act to publicize information provided to the defense in discovery, the public disclosure of which may require outside agency approval and the substance of which may cause irreparable prejudice to the United States. Much of the information in this case was disclosed under various protective

orders which remain in effect, including grand jury subpoena information, Secretary of the Army 15-6 investigation information, and law enforcement sensitive information. This protected information was provided to the defense for discovery and under the specific condition not to publish or release it outside of the specific individuals who were allowed access to the information.

The defense purports that it wants to publish this information online to keep the public informed of the proceeding. The public, however, is already well informed of the proceedings. The public was present at the Article 32 hearing, the arraignment, and the first motions hearing, and will continue to be present at all open portions of the motions hearings and the trial. The command provided the theater next door for overflow area so that the public can freely watch the proceedings and the media operations center for the media. Additionally, other than the electronic filing process, the military justice system is more open than the federal system from the Article 32 proceedings through the end of the trial.

The United States does not intend to publish its pleadings online. If the defense remains intent on publishing all pleadings and their enclosures online, the United States requests the opportunity to file a motion for a protective order or multiple protective orders under RCM 701(g)(2) and 806(d) for the Court to regulate the defense's use of information gained through discovery. Additionally the United States requests the Court allow the prosecution thirty days to receive input from all the different federal entities on what information they provided for discovery which they did not intend to be made publically available. The sole purpose of discovery is to prepare for trial. Motions are filed to shape legal issues and belong to the Court. Most motions, e.g., motions to suppress or exclude evidence or testimony, are not appropriate for publication. Freely publicizing all pleadings, at this stage of the proceedings, may undermine the effectiveness of the publicity order and will circumvent those measures adopted to regulate what is available to the public and significantly jeopardize many interests of the United States, to include, protecting classified information (in the case of a spillage), preserving the confidentiality of law enforcement information, preventing potential witnesses from receiving information outside the scope of their projected testimony, protecting testifying witnesses, protecting trial participant safety, protecting the personal information of potential panel members, preventing disclosure of government information that threatens national security and is unclassified, and the deliberative processes of the United States Government. Furthermore, the United States believes that the defense's intended course of action would result in a substantial likelihood of materially prejudicing the proceeding, in violation of, inter alia, RCM 806(d) and Army Regulation 27-26, specifically Rule 3.6.

v/r
MAJ Fein

Classification: UNCLASSIFIED
Caveats: NONE

Classification: UNCLASSIFIED
Caveats: NONE

Classification: UNCLASSIFIED
Caveats: NONE

Classification: UNCLASSIFIED
Caveats: NONE

MEMORANDUM FOR Convening Authority

SUBJECT: Acknowledgment of Protective Order for the Secretary of the Army AR 15-6 Investigation – United States v. PFC Bradley Manning

1. I, David E. Conbs, have read and understand the protective order, dated 22 June 2011, relating to the SecArmy AR 15-6 Investigation, and I agree to comply with the provisions thereof. I understand that further disclosure of the SecArmy AR 15-6 Investigation is unauthorized unless the disclosure adheres to the requirements of the protective order.
2. I understand that the unauthorized disclosure, unauthorized retention, and negligent handling of the SecArmy AR 15-6 Investigation will result in the Convening Authority's review of the access procedures utilized in this case and may limit ease of access to all evidence related to this case in the future.
3. If I am uncertain about whether documents or information are covered by this protective order, I understand that I must confirm with the Convening Authority through the trial counsel.
4. I understand that I remain bound to this agreement after the conclusion of all proceedings, if any, in the above referenced case. Upon termination of all proceedings, the sensitive information disclosed in this case shall be returned to the trial counsel.

29 June 2011
DATE


SIGNATURE



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
JOINT BASE MYER-HENDERSON HALL
204 LEE AVENUE
FORT MYER, VIRGINIA 22211-1190

IMND-MHH-ZA

22 Jun 11

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Protective Order for Law Enforcement Sensitive Information and Other Sensitive Information - United States v. PFC Bradley Manning

1. **PURPOSE.** The purpose of this protective order is to prevent the unauthorized disclosure or dissemination of law enforcement sensitive information, grand jury information, search warrant documents, and applications and orders pursuant to 18 U.S.C. § 2703(d) (hereinafter "sensitive information"). This protective order covers all sensitive information previously available to the accused, defense counsel, or other authorized recipients in the course of this case or which will be made available to the accused, defense counsel, and other authorized recipients of sensitive information in this case.

2. **APPLICABILITY.** Without authorization from me, defense counsel shall not disclose or distribute sensitive information to any person or entity other than the following "authorized recipients": (a) other defense counsel of record for the accused; (b) the accused; (c) any associate, paralegal, or clerical employee involved in the defense of the accused; (d) the Article 32 Investigating Officer; (e) third parties whose testimonies are taken in this action, but only to the extent necessary to elicit testimony concerning the statement; and (f) independent experts needed to provide technical or expert services or testimony in the prosecution of the accused.

3. **ORDER.** In order to protect sensitive information, it is hereby ORDERED:

a. Authorized recipients shall not disclose sensitive information to any person not named above. Defense counsel may only provide sensitive information to the above authorized recipients when necessary for the purpose of preparing a defense to the charges pending against the accused.

b. The procedures set forth in this protective order apply to sensitive information disclosed in this case, including all sensitive documents and associated materials previously disclosed during discovery.

c. The term "sensitive information" refers to:

(1) all law enforcement sensitive information and documents (or information contained or referenced therein) disclosed to authorized recipients as part of the proceedings in this case, including without limitation, U.S. Army Criminal Investigation Command reports and exhibits, Federal Bureau of Investigation reports and exhibits, Diplomatic Security Service reports and

SUBJECT: Protective Order for Law Enforcement Sensitive Information and Other Sensitive Information – United States v. PFC Bradley Manning

exhibits, and other law enforcement sensitive reports, operational details and reports, investigative details and reports, and any attachments thereto;

(2) any information related to the locations, functions, or activities of any Cryptologic Support Teams or any member thereof;

(3) all federal district court documents and associated materials disclosed to authorized recipients as part of the proceedings in this case, including without limitation, grand jury information, search warrant documents, and applications and orders pursuant to 18 U.S.C. § 2703(d); and

(4) information and documents known or that reasonably should be known by authorized recipients to be sensitive information.

d. The words "documents" or "associated materials" as used in this protective order include, but are not limited to, all written or printed matter of any kind, formal or informal, including the originals and all non-identical copies, whether different from the original by reason of any notation made on such copies or otherwise, including, without limitation, papers, correspondence, memoranda, notes, letters, telegrams, reports, summaries, inter-office and intra-office communications, notations of any sort, bulletins, teletypes, telefax, invoices, worksheets, and all drafts, alterations, modifications, changes, and amendment of any kind to the foregoing, graphic or aural records or representations of any kind, including, without limitation, photographs, charts, graphs, microfiche, microfilm, video tapes, sound recordings of any kind, motion pictures, any electronic, mechanical or electric records or representations of any kind, including, without limitation, tapes, cassettes, CDs, DVDs, thumbdrives, hard drives, other recordings, films, typewriter ribbons and word processor discs or tapes.

e. The word "or" should be interpreted as including "and," and vice versa; "he" should be interpreted as including "she," and vice versa.

f. Authorized recipients must sign a written acknowledgment (enclosed) that they are bound by the terms of this protective order as a condition precedent to the disclosure of information.

g. Authorized recipients must also sign a copy of any relevant district court disclosure and protective order after having read the protective order and having the contents of the protective order fully explained to them by defense counsel.

h. Defense counsel shall prepare a list of the names of all persons to whom sensitive information is disclosed and obtain a copy of their signed acknowledgments. Defense counsel will file the list and acknowledgments with the trial counsel prior to receiving the protected sensitive information. Prior to any additional disclosure of sensitive information, defense counsel must supplement the list and file additional acknowledgments with the trial counsel.

IMND-MHH-ZA

SUBJECT: Protective Order for Law Enforcement Sensitive Information and Other Sensitive Information – United States v. PFC Bradley Manning

i. Upon termination of all proceedings, if any, the sensitive information disclosed in this case shall be returned to the trial counsel.

j. If authorized recipients are uncertain whether documents or information are covered by this protective order, they must confirm with me through the trial counsel.

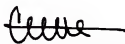
k. Authorized recipients are advised that a violation of this protective order will result in my review of the access procedures utilized in this case and may limit ease of access to all evidence related to this case in the future. Violations of this protective order may also violate federal district court disclosure and protective orders and will result in the forwarding of your name to the U.S. Attorney's Office for the Eastern District of Virginia.

4. **MODIFICATION.** Should the accused or any other party listed in paragraph 2 wish to disclose sensitive information to any person or for any purpose other than those indicated in paragraph 2, they may, upon written request, seek modification of this protective order through the trial counsel to me.

5. **NOTIFICATION.** If you suspect or have reason to believe that any unauthorized disclosure of sensitive information has occurred, notify me through the trial counsel as soon as practicably possible.

6. Nothing contained in this protective order shall be construed as a waiver of any right of the accused.

Encl
Acknowledgment


CARL R. COFFMAN, JR
COL, AV
Commanding

DISTRIBUTION: (w/encl)
Defense Counsel
Accused
Article 32 Investigating Officer

MEMORANDUM FOR Convening Authority

SUBJECT: Acknowledgment of Protective Order for Law Enforcement Sensitive Information and Other Sensitive Information – United States v. PFC Bradley Manning

1. I, _____, have read and understand the protective order, dated 22 June 2011, relating to sensitive information, and I agree to comply with the provisions thereof. I understand that further disclosure of this sensitive information is unauthorized unless the disclosure adheres to the requirements of the protective order.
2. I understand that the unauthorized disclosure, unauthorized retention, and negligent handling of this sensitive information will result in the Convening Authority's review of the access procedures utilized in this case and may limit ease of access to all evidence related to this case in the future. Violations of this protective order may also violate federal district court disclosure and protective orders and will result in the forwarding of my name to the U.S. Attorney's Office for the Eastern District of Virginia. I understand that I also must sign a copy of any relevant district court disclosure and protective order as a condition precedent to receiving grand jury information, search warrant documents, and applications and orders pursuant to 18 U.S.C. § 2703(d).
3. If I am uncertain about whether documents or information are covered by this protective order, I understand that I must confirm with the Convening Authority through the trial counsel.
4. I understand that I remain bound to this agreement after the conclusion of all proceedings, if any, in the above referenced case. Upon termination of all proceedings, the sensitive information disclosed in this case shall be returned to the trial counsel.

DATE

SIGNATURE

MEMORANDUM FOR Convening Authority

SUBJECT: Acknowledgment of Protective Order for Law Enforcement Sensitive Information and Other Sensitive Information – United States v. PFC Bradley Manning

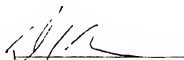
1. I, David E. Conly, have read and understand the protective order, dated 22 June 2011, relating to sensitive information, and I agree to comply with the provisions thereof. I understand that further disclosure of this sensitive information is unauthorized unless the disclosure adheres to the requirements of the protective order.

2. I understand that the unauthorized disclosure, unauthorized retention, and negligent handling of this sensitive information will result in the Convening Authority's review of the access procedures utilized in this case and may limit ease of access to all evidence related to this case in the future. Violations of this protective order may also violate federal district court disclosure and protective orders and will result in the forwarding of my name to the U.S. Attorney's Office for the Eastern District of Virginia. I understand that I also must sign a copy of any relevant district court disclosure and protective order as a condition precedent to receiving grand jury information, search warrant documents, and applications and orders pursuant to 18 U.S.C. § 2703(d).

3. If I am uncertain about whether documents or information are covered by this protective order, I understand that I must confirm with the Convening Authority through the trial counsel.

4. I understand that I remain bound to this agreement after the conclusion of all proceedings, if any, in the above referenced case. Upon termination of all proceedings, the sensitive information disclosed in this case shall be returned to the trial counsel.

24 June 2011
DATE


SIGNATURE



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
JOINT BASE MYER-HENDERSON HALL
204 LEE AVENUE
FORT MYER, VIRGINIA 22211-1199

IMND-MHH-ZA

17 September 2010

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Protective Order for Classified Information – United States v. PFC Bradley Manning

1. **PURPOSE.** The purpose of this Protective Order is to prevent the unauthorized disclosure or dissemination of classified national security information in the subject named case. This Protective Order covers all information and documents previously available to the accused in the course of his employment with the United States Government or which have been, or will be, reviewed or made available to the accused, defense counsel, and other recipients of classified information in this case.

2. **APPLICABILITY.** "Persons subject to this Protective Order" include the following:

- a. the Accused;
- b. Military and Civilian Defense Counsel and Detailed Military Paralegals;
- c. Members of the Defense Team IAW M.R.E. 502 and U.S. v. Toledo, 25 M.J. 270 (C.M.A. 1987);
- d. Security Officers;
- e. Members of the Rule for Courts-Martial 706 Inquiry Board; and
- f. Behavioral Health Providers for the Accused.

3. **ORDER.** In order to protect the national security and pursuant to the authority granted under Military Rule of Evidence (MRE) 505, relevant executive orders of the President of the United States, and regulations of the Departments of Defense and of the Army, it is hereby ORDERED:

- a. The procedures set forth in this Protective Order and the authorities referred to above will apply to the Rule for Courts-Martial (RCM) 706 inquiry, Article 32 investigation, pretrial, trial, post-trial, and appellate matters concerning this case.
- b. The term "classified information" refers to:
 - (1) any classified document (or information contained therein);

(2) information known or that reasonably should be known by persons subject to this Protective Order to be classifiable. If persons subject to this Protective Order are uncertain as to whether the information is classified, they must confirm whether the information is classified;

(3) classified documents (or information contained therein) disclosed to persons subject to this Protective Order as part of the proceedings in this case;

(4) classified documents and information which have otherwise been made known to persons subject to this Protective Order and which have been marked or described as: "CONFIDENTIAL", "SECRET", or "TOP SECRET".

c. All such classified documents and information contained therein shall remain classified unless such classified information bear clear indication they have been declassified by the government agency or department that originated the document or information contained therein (hereinafter referred to as "original classification authority").

d. The words "documents" or "associated materials" as used in this Protective Order include, but are not limited to, all written or printed matter of any kind, formal or informal, including the originals and all non-identical copies, whether different from the original by reason of any notation made on such copies or otherwise, including, without limitation, papers, correspondence, memoranda, notes, letters, telegrams, reports, summaries, inter-office and intra-office communications, notations of any sort, bulletins, teletypes, telefax, invoices, worksheets, and all drafts, alterations, modifications, changes, and amendment of any kind to the foregoing, graphic or aural records or representations of any kind, including, without limitation, photographs, charts, graphs, microfiche, microfilm, video tapes, sound recordings of any kind, motion pictures, any electronic, mechanical or electric records or representations of any kind, including, without limitation, tapes, cassettes, CDs, DVDs, thumbdrives, hard drives, other recordings, films, typewriter ribbons and word processor discs or tapes.

e. The word "or" should be interpreted as including "and", and vice versa; "he" should be interpreted as including "she", and vice versa.

f. Persons subject to this Protective Order are advised that direct or indirect unauthorized disclosure, retention, or negligent handling of classified information could cause serious and, in some cases, exceptionally grave damage to the national security of the United States, or may be used to the advantage of a foreign nation against the interests of the United States. These security procedures are designed to ensure that persons subject to this Protective Order will never divulge the classified information disclosed to them to anyone who is not authorized to receive it, without prior written authorization from the original classification authority and in conformity with these procedures.

g. Persons subject to this Protective Order are admonished that they are obligated by law and regulation not to disclose any classified information in an unauthorized fashion.

h. Persons subject to this Protective Order are admonished that any breach of the security procedures in this Protective Order may result in the termination of their access to classified information. In addition, they are admonished that any unauthorized disclosure, possession, or handling of classified information may constitute violations of United States criminal laws, including but not limited to, the provisions of Sections 641, 793, 794, 798, and 952, Title 18, United States Code, and Sections 421 and 783(b), Title 50, United States Code. In addition, for those persons who are attorneys, a report will be filed with their State Bar Association.

4. Prior to any RCM 706 inquiry, Article 32 investigation, or court-martial proceeding, a security officer will be appointed in writing and served with a copy of this protective order.

5. Personnel Security Investigations and Clearances

a. The storage, handling, and control of classified information requires special security precautions mandated by statute, executive orders, and regulations, and access to which require a security clearance.

b. Once a person subject to this Protective Order obtains a security clearance and executes a non-disclosure agreement (SF 312), that person is eligible for access to classified information, subject to the convening authority's disclosure determination.

c. As a condition of receiving classified information, any retained civilian defense counsel will agree to the conditions specified herein and execute all necessary forms so that the Department of the Army may complete the necessary personnel security investigation to make a determination whether to grant access. Any retained civilian defense counsel will also sign the Acknowledgment of Protective Order (hereinafter "Acknowledgment"). Any retained civilian defense counsel shall also sign a standard form nondisclosure agreement (SF 312) as a condition of access to classified information.

d. In addition to the Acknowledgment, any person who as a result of this case gains access to information contained in any Department of the Army Special Access Program, as that term is defined in Executive Order 13526 [or for events occurring before 27 June 2010, E.O. 12958], or to Sensitive Compartmented Information (SCI), shall sign any nondisclosure agreement which is specific to that Special Access Program or to that Sensitive Compartmented Information.

e. All other requests for clearances for access to classified information in this case for persons not named in this Protective Order or for clearances to a higher level of classification, shall be made through the trial counsel to the convening authority.

f. The security procedures contained in this Protective Order shall apply to any civilian defense counsel retained by the accused, and to any other persons who may later receive classified information from the U.S. Department of the Army in connection with this case.

6. Handling and Protection of Classified Information

- a. All persons subject to this Protective Order shall seek guidance from their respective security officers with regard to the appropriate storage and use of classified information.
- b. The defense security officer will ensure appropriate physical security protection for any materials prepared or compiled by the defense, or by any person in relation to the preparation of the accused's defense or submission under MRE 505. The materials and documents (defined above) requiring physical security include, without limitation, any notes, carbon papers, letters, photographs, drafts, discarded drafts, memoranda, typewriter ribbons, computer diskette, CD/DVDs, magnetic recording, digital recordings, or other documents or any kind or description.
- c. Classified information, or information believed to be classified, shall only be discussed in an area approved by a security officer, and in which persons not authorized to possess such information cannot overhear such discussions.
- d. No one shall discuss any classified information over a standard commercial telephone instrument, an inter-office communication system, or in the presence of any person who is not authorized to possess such information.
- e. Written materials prepared for this case by persons subject to this Protective Order shall be transcribed, recorded, typed, duplicated, copied, or otherwise prepared only by persons who have received access to classified information pursuant to the security procedures contained in this Protective Order.
- f. All mechanical devices, of any kind, used in the preparation or transmission of classified information in this case may be used only with the approval of a security officer.
- g. Upon reasonable advance notice to the trial counsel or a security officer, defense counsel shall be given access during normal business hours and at other times on reasonable request, to classified documents which the government is required to make available to defense counsel but elects to keep in its possession. Persons permitted to inspect classified documents by this Protective Order may make written notes of the documents and their contents. Notes of any classified portions of these documents, however, shall not be disseminated or disclosed in any manner or form to any person not subject to this Protective Order. Such notes will be secured in accordance with the terms of this Protective Order. Persons permitted to have access to classified documents will be allowed to view their notes within an area designated by a security officer. No person permitted to inspect classified documents by this Protective Order, including defense counsel, shall copy or reproduce any part of said documents or their contents in any manner or form, except as provided by a security officer, after he has consulted with the trial counsel.
- h. The persons subject to this Protective Order shall not disclose the contents of any classified documents or information to any person not named herein, except the trial counsel and military judge.

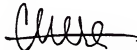
IMND-MHH-ZA

SUBJECT: Protective Order for Classified Information – United States v. PFC Bradley Manning

i. All persons given access to classified information pursuant to this Protective Order are advised that all information to which they obtain access by the Protective Order is now and will forever remain the property of the United States Government. They shall return all materials which may have come into their possession, or for which they are responsible because of such access, upon demand by a security officer.

j. All persons subject to this Protective Order shall sign the Acknowledgment, including the defense counsel and accused. The signing and filing of this Acknowledgment is a condition precedent to the disclosure of any classified information to any person subject to this Protective Order.

7. This Protective Order supersedes all previous protective orders. Nothing contained in this Protective Order shall be construed as a waiver of any right of the accused.



CARL R. COFFMAN, JR.
COL, AV
Commanding

DISTRIBUTION:

1-Trial Counsel
1-Civilian Defense Counsel
1-Senior Military Defense Counsel
1-Accused
1-Defense Experts
1-R.C.M. 706 Inquiry Board



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
HEADQUARTERS, 1ST ARMORED DIVISION AND
UNITED STATES DIVISION CENTER
CAMP LIBERTY, IRAQ
APO AE 09344

28 JUL 2000

AETV-TRZ

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Protective Order

1. In order to protect the national security and pursuant to the authority granted under Military Rule of Evidence (MRE) 505, relevant executive orders of the President of the United States, and regulations of the Department of the Army, I ORDER:

a. The following security procedures, MRE 505, and the authorities referred to above will apply to all matters concerning the investigation into alleged offenses, pre-trial negotiations, and Article 32, Uniform Code of Military Justice (UCMJ), pre-trial investigation in this case.

b. As used herein, the term "classified information or document" refers to:

- (1) any classified document (or information contained therein);
- (2) information known by the accused or defense counsel to be classifiable;
- (3) classified documents (or information contained therein) disclosed to the accused or defense counsel as part of the proceedings in this case;
- (4) classified documents and information which have otherwise been made known to the accused or defense counsel and which have been marked or described as: "CONFIDENTIAL," "SECRET," or "TOP SECRET."

c. All such classified documents and information contained therein shall remain classified unless they bear a clear indication that they have been officially declassified by the Government agency or department that originated the document or the information contained therein (hereinafter referred to as the "originating agency").

d. The words "documents" or "associated materials" as used in this Order include, but are not limited to, all written or printed matter of any kind, formal or informal, including the originals and all non-identical copies, whether different from the original by reason of any notation made on such copies or otherwise, including, without limitation, papers, correspondence, memoranda, notes, letters, telegrams, reports, summaries, inter-office and intra-office communications, notations of any sort, bulletins, teletypes, telex, invoices, worksheets, and all drafts, alterations, modifications, changes and amendment of any kind to the foregoing, graphic or aural records or representations of any kind, including, without limitation, photographs, charts, graphs, microfiche, microfilm, video tapes, sound recordings of any kind,

AE 14-114/
SUBJECT: Protective Order

motion pictures, any electronic, mechanical or electric records or representations of any kind, including without limitation, tapes, cassettes, discs, recording, films, typewriter ribbons and word processor discs or tapes.

e. The word "or" should be interpreted as including "and" and vice versa.

f. Those named herein are advised that direct or indirect unauthorized disclosure, retention, or negligent handling of classified information could cause serious and, in some cases, exceptionally grave damage to the national security of the United States, or may be used to the advantage of a foreign nation against the interests of the United States. These Security Procedures are to ensure that persons subject to these Procedures will never divulge the classified information disclosed to them to anyone who is not authorized by the originating agency and in conformity with these procedures.

g. Persons subject to these Procedures are admonished that they are obligated by law and regulation not to disclose any classified national security information in an unauthorized fashion.

h. Persons subject to these Procedures are admonished that any breach of these Procedures may result in the termination of their access to classified information. In addition, they are admonished that any unauthorized disclosure, possession or handling of classified information may constitute violations of United States criminal laws, including but not limited to, the provisions of Sections 641, 793, 794, 798 and 952, Title 18, United States Code, and Sections 421 and 783(b), Title 50, United States Code. In addition, for those persons who are attorneys, a report will be filed with their State Bar Association.

2. Information in the public domain is ordinarily not classified. However, if classified information is reported in the press or otherwise enters the public domain, the information does not lose its classified status merely because it is in the public domain. Any attempt by the defense to have classified information that has been reported in the public domain but which it knows or has reason to believe is classified, confirmed, or denied at trial or in any public proceeding in this case shall be governed by Section 3 of the Classified Information Procedures Act, 18 U.S. Code Appendix III.

3. Personnel Security Investigations and Clearances. This case will involve classified national security information or documents, the storage, handling, and control of which requires special security precautions mandated by statute, executive orders, and regulations, and access to which requires a special security clearance.

a. The Convening Authority has been advised that the Investigating Officer has the requisite security clearance to have access to the classified information and documents which will be at issue in this case. The Investigating Officer is to have unfettered access to that classified information necessary to prepare for this investigation, subject to requirement in paragraph 3.g. below.

b. The Convening Authority has been advised that the government trial counsel working on this case have the requisite security clearances to have access to the classified information and

documents which will be at issue in this case. The government trial counsel are to have unfettered access to classified information necessary to prepare for this investigation, subject to the requirements in paragraph 3 g. below.

c. The Convening Authority has been advised that Private First Class (PFC) Bradley Manning's detailed defense counsel have the requisite security clearance to have access to the relevant and necessary classified information and documents which will be at issue in this case. As a condition of receiving classified information, the detailed defense counsel agree to the conditions specified herein this order.

d. As a condition of receiving classified information, any retained defense counsel will agree to the conditions specified herein and execute all necessary forms so that the Government may complete the necessary personnel security background investigation to make a determination whether defense counsel is eligible for a limited access authorization. Any retained defense counsel will also sign the statement in paragraph 3 e. 1 upon the execution and filing of the statements set forth in paragraphs 3 c and 3.1 by any retained defense counsel requiring access to classified information, the Government shall undertake, as expeditiously as possible, the required inquiries to ascertain defense counsel's eligibility for access to classified information.

e. There are two conditions precedent to obtaining access to the classified information at issue in this case:

(1) All individuals, other than the Investigating Officer, Government and detailed defense counsels and personnel of the originating agency, can obtain access only after having provided the necessary information required for, and having been granted, a security clearance or Limited Access Authorization by the Department of the Army or Department of State, through the Investigation Security Officer; and

(2) Each person, other than the Department of Army employees named herein and personnel of the originating agency, before being granted access to classified information must also sign a sworn statement that states:

MEMORANDUM OF UNDERSTANDING

I, _____, understand that I may be the recipient of information and intelligence that concerns the security of the United States and that belongs to the United States. This information and intelligence, together with the methods of collecting and handling it, are classified according to security standards established by the U.S. Government. I have read and understand the provisions of the espionage laws (Sections 793, 794 and 798 of title 18, United States Code) concerning the disclosure of information relating to the national defense and the provisions of the Intelligence Identities Protection Act (section 421 of title 50, United States Code) and I am familiar with the penalties provided for the violation thereof.

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2. I agree that I will never divulge, publish or reveal, either by word, conduct, or any other means, such information or intelligence unless specifically authorized in writing to do so by an authorized representative of the U.S. Government or as otherwise ordered by the Court. I further agree to submit for prepublication review any article, speech, or other publication derived from or based upon experience or information gained in the course of United States v. Private First Class Bradley E. Manning. I understand this review is solely to ensure that no classified national security information is contained therein.

3. I understand that this agreement will remain binding upon me after the conclusion of the proceedings in the case of United States v. Private First Class Bradley E. Manning.

4. I have received, read and understand the Security Procedures entered by the Convening Authority on _____ 2010 in the case of United States v. Private First Class Bradley E. Manning relating to classified information, and I agree to comply with the provisions thereof.

Signature Date

Any MOU with a retained defense counsel shall include a statement expressing his understanding that the failure to abide by the terms of these Security Procedures will result in a report to his State Bar Association. Each such person executing the above statement must file an original with the Investigating Officer and provide an original each to the Investigation Security Officer and the Government Counsel.

f. In addition to signing the MOU in paragraph 3 e, any person who, as a result of this investigation, gains access to information contained in any Department of the Army Special Access Program, as that term is defined in section 4.2 of Executive Order 12356, to Sensitive Compartmented Information (SCI), or to any information subject to Special Category (SPECAT) handling procedures, shall sign any non-disclosure agreement which is specific to that Special Access Program, Sensitive Compartmented Information, or SPECAT information.

g. All other requests for clearances for access to classified information in this case by persons not named in these Procedures, or requests for clearances for access to information at a higher level of classification, shall be made to the Investigation Security Officer, who, upon approval of the Convening Authority, shall promptly process the requests.

h. Before any person subject to these Security Procedures, other than government trial counsel, detailed defense counsel, and personnel of the originating agency who have appropriate level security clearances, receives access to any classified information, that person shall be served with a copy of these Procedures and shall execute the written agreement set forth in paragraph 3.e.

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The Procedures shall apply to any defense counsel of the accused, and to any other persons who may later receive classified information from the Department of the Army or Department of State in connection with this case.

- Handling and Protection of Classified Information.

a. All counsel shall seek guidance from the Investigation Security Officer with regard to appropriate storage and use of classified information.

b. The Investigation Security Officer will provide appropriate physical security protection for any materials prepared or compiled by the defense, or by any person in relation to the preparation of the accused's defense or submission under MRE 505. The materials and documents (defined above) requiring physical security include, without limitation, any notes, carbon papers, letters, photographs, drafts, discarded drafts, memoranda, typewriter ribbons, magnetic recording, or other documents of any kind or description. Classified materials prepared by the defense shall be maintained by the Investigation Security Officer in a separate sealed container to which only the defense counsel shall have access.

c. Classified documents and information, or information believed to be classified shall be discussed only in an area approved by the Investigation Security Officer, and in which persons not authorized to possess such information cannot overhear such discussions.

d. No one shall discuss any classified information over any standard commercial telephone instrument or any inter-office communication system, or in the presence of any person who is not authorized to possess such information.

e. Written materials prepared for this case by the accused or defense counsel shall be transcribed, recorded, typed, duplicated, copied or otherwise prepared only by persons who are cleared for access to such information.

f. All mechanical devices of any kind used in the preparation or transmission of classified information in this case may be used only with the approval of the Investigation Security Officer and in accordance with instructions he or she shall issue.

g. Upon reasonable advance notice of the Investigation Security Officer, defense counsel shall be given access during normal business hours, and at other times on reasonable request, to classified national security documents which the government is required to make available to defense counsel but elects to keep in its possession. Persons permitted to inspect classified documents by these Procedures may make written notes of the documents and their contents. Notes of any classified portions of these documents, however, shall not be disseminated or disclosed in any manner or form to any person not subject to these Procedures. Such notes will be secured in accordance with the terms of these Procedures. Persons permitted to have access to classified documents will be allowed to view their notes within an area designated by the Investigation Security Officer. No person permitted to inspect classified documents by these Procedures, including defense counsel, shall copy or reproduce any part of said documents or

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their contents in any manner or form, except as provided by the Investigation Security Officer, after he or she has consulted with the Convening Authority.


h. Without prior authorization of the Department of the Army or Department of State, there shall be no disclosure to anyone not named in these Procedures by persons who may later receive a security clearance or limited access authorization from the Department of the Army or Department of State in connection with this case (except to or from government employees acting in the course of their official duties) of any classified national security information or national security document (or information contained therein) until such time, if ever, that such documents or information are declassified.

i. The defense shall not disclose the contents of any classified documents or information to any person except those persons identified to them by the Investigating Officer as having the appropriate clearances, and a need to know.

j. All persons given access to classified information pursuant to these Procedures are advised that all information to which they obtain access by these Procedures is now and will forever remain the property of the United States Government. They shall return all materials which may have come into their possession, or for which they are responsible because of such access, upon demand by the Investigation Security Officer.

k. A copy of these Procedures shall issue forthwith to defense counsel, with further order that the defense counsel advise the accused named herein of the contents of these Procedures, and furnish him a copy. The accused, through defense counsel, shall forthwith sign the statements set forth in paragraph 3.f of these Procedures, and counsel shall forthwith file an original with the Investigating Officer and provide an original, each to the Investigation Security Officer and the Government Counsel. The signing and filing of this statement by the accused is a condition precedent to the disclosure of classified information to the accused.

5. Nothing contained in these Procedures shall be construed as waiver of any right of the accused.



TERRY A. WOLFF
Major General, USA
Commanding

DISTRIBUTION:
Investigating Officer
Trial Counsel
Defense Counsel



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
HEADQUARTERS, 1ST ARMORED DIVISION AND
UNITED STATES DIVISION-CENTER
CAMP LIBERTY, IRAQ
APO AE 09344

58 JUL 2000

AEIV-TRZ

MEMORANDUM FOR SEF DISTRIBUTION

SUBJECT: Protective Order

1. In order to protect the national security and pursuant to the authority granted under Military Rule of Evidence (MRE) 505, relevant executive orders of the President of the United States, and regulations of the Department of the Army, I ORDER:

a. The following security procedures, MRE 505, and the authorities referred to above will apply to all matters concerning the investigation into alleged offenses, pre-trial negotiations, and Article 32, Uniform Code of Military Justice (UCMJ), pre-trial investigation in this case:

b. As used herein, the term "classified information or document" refers to:

(1) any classified document (or information contained therein);

(2) information known by the accused or defense counsel to be classifiable;

(3) classified documents (or information contained therein) disclosed to the accused or defense counsel as part of the proceedings in this case;

(4) classified documents and information which have otherwise been made known to the accused or defense counsel and which have been marked or described as: "CONFIDENTIAL," "SECRET," or "TOP SECRET."

c. All such classified documents and information contained therein shall remain classified unless they bear a clear indication that they have been officially declassified by the Government agency or department that originated the document or the information contained therein (hereinafter referred to as the "originating agency").

d. The words "documents" or "associated materials" as used in this Order include, but are not limited to, all written or printed matter of any kind, formal or informal, including the originals and all non-identical copies, whether different from the original by reason of any notation made on such copies or otherwise, including, without limitation, papers, correspondence, memoranda, notes, letters, telegrams, reports, summaries, inter-office and intra-office communications, notations of any sort, bulletins, teletypes, telex, invoices, worksheets, and all drafts, alterations, modifications, changes and amendment of any kind to the foregoing, graphic or aural records or representations of any kind, including, without limitation, photographs, charts, graphs, microfiche, microfilm, video tapes, sound recordings of any kind,

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motion pictures, any electronic, mechanical or electric records or representations of any kind, including without limitation, tapes, cassettes, discs, recording, films, typewriter ribbons and word processor discs or tapes.

- e. The word "or" should be interpreted as including "and" and vice versa.

f. Those named herein are advised that direct or indirect unauthorized disclosure, retention, or negligent handling of classified information could cause serious and, in some cases, exceptionally grave damage to the national security of the United States, or may be used to the advantage of a foreign nation against the interests of the United States. These Security Procedures are to ensure that persons subject to these Procedures will never divulge the classified information disclosed to them to anyone who is not authorized by the originating agency and in conformity with these procedures.

g. Persons subject to these Procedures are admonished that they are obligated by law and regulation not to disclose any classified national security information in an unauthorized fashion.

h. Persons subject to these Procedures are admonished that any breach of these Procedures may result in the termination of their access to classified information. In addition, they are admonished that any unauthorized disclosure, possession or handling of classified information may constitute violations of United States criminal laws, including but not limited to, the provisions of Sections 641, 793, 794, 798 and 952, Title 18, United States Code, and Sections 421 and 783(b), Title 50, United States Code. In addition, for those persons who are attorneys, a report will be filed with their State Bar Association.

2. Information in the public domain is ordinarily not classified. However, if classified information is reported in the press or otherwise enters the public domain, the information does not lose its classified status merely because it is in the public domain. Any attempt by the defense to have classified information that has been reported in the public domain but which it knows or has reason to believe is classified, confirmed, or denied at trial or in any public proceeding in this case shall be governed by Section 3 of the Classified Information Procedures Act, 18 U.S. Code Appendix III.

3. Personnel Security Investigations and Clearances. This case will involve classified national security information or documents, the storage, handling, and control of which requires special security precautions mandated by statute, executive orders, and regulations, and access to which requires a special security clearance.

a. The Convening Authority has been advised that the Investigating Officer has the requisite security clearance to have access to the classified information and documents which will be at issue in this case. The Investigating Officer is to have unfettered access to that classified information necessary to prepare for this investigation, subject to requirement in paragraph 3.g. below.

b. The Convening Authority has been advised that the government trial counsel working on this case have the requisite security clearances to have access to the classified information and

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documents which will be at issue in this case. The government trial counsel are to have unfettered access to classified information necessary to prepare for this investigation, subject to the requirements in paragraph 3.g. below.

c. The Convening Authority has been advised that Private First Class (PFC) Bradley Manning's detailed defense counsel have the requisite security clearance to have access to the relevant and necessary classified information and documents which will be at issue in this case. As a condition of receiving classified information, the detailed defense counsel agree to the conditions specified herein this order.

d. As a condition of receiving classified information, any retained defense counsel will agree to the conditions specified herein and execute all necessary forms so that the Government may complete the necessary personnel security background investigation to make a determination whether defense counsel is eligible for a limited access authorization. Any retained defense counsel will also sign the statement in paragraph 3.e. Upon the execution and filing of the statements set forth in paragraphs 3.e and 3.f by any retained defense counsel requiring access to classified information, the Government shall undertake, as expeditiously as possible, the required inquiries to ascertain defense counsel's eligibility for access to classified information.

e. There are two conditions precedent to obtaining access to the classified information at issue in this case:

(1) All individuals, other than the Investigating Officer, Government and detailed defense counsel and personnel of the originating agency, can obtain access only after having provided the necessary information required for, and having been granted, a security clearance or Limited Access Authorization by the Department of the Army or Department of State, through the Investigation Security Officer; and

(2) Each person, other than the Department of Army employees named herein and personnel of the originating agency, before being granted access to classified information must also sign a sworn statement that states:

MEMORANDUM OF UNDERSTANDING

I, _____, understand that I may be the recipient of information and intelligence that concerns the security of the United States and that belongs to the United States. This information and intelligence, together with the methods of collecting and handling it, are classified according to security standards established by the U.S. Government. I have read and understand the provisions of the espionage laws (Sections "93" and "98" of title 18, United States Code) concerning the disclosure of information relating to the national defense and the provisions of the Intelligence Identities Protection Act (Section 421 of title 50, United States Code) and I am familiar with the penalties provided for the violation thereof.

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2. I agree that I will never divulge, publish or reveal, either by word, conduct, or any other means, such information or intelligence unless specifically authorized in writing to do so by an authorized representative of the U.S. Government or as otherwise ordered by the Court. I further agree to submit for prepublication review any article, speech, or other publication derived from or based upon experience or information gained in the course of United States v. Private First Class Bradley E. Manning. I understand this review is solely to ensure that no classified national security information is contained therein.

3. I understand that this agreement will remain binding upon me after the conclusion of the proceedings in the case of United States v. Private First Class Bradley E. Manning.

4. I have received, read and understand the Security Procedures entered by the Convening Authority on 2010 in the case of United States v. Private First Class Bradley E. Manning relating to classified information, and I agree to comply with the provisions thereof.

Signature Date

Any MOU with a retained defense counsel shall include a statement expressing his understanding that the failure to abide by the terms of these Security Procedures will result in a report to his State Bar Association. Each such person executing the above statement must file an original with the Investigating Officer and provide an original each to the Investigation Security Officer and the Government Counsel.

f. In addition to signing the MOU in paragraph 3.e, any person who, as a result of this investigation, gains access to information contained in any Department of the Army Special Access Program, as that term is defined in section 4.2 of Executive Order 12356, to Sensitive Compartmented Information (SCI), or to any information subject to Special Category (SPECAT) handling procedures, shall sign any non-disclosure agreement which is specific to that Special Access Program, Sensitive Compartmented Information, or SPECAT information.

g. All other requests for clearances for access to classified information in this case by persons not named in these Procedures, or requests for clearances for access to information at a higher level of classification, shall be made to the Investigation Security Officer, who, upon approval of the Convening Authority, shall promptly process the requests.

h. Before any person subject to these Security Procedures, other than government trial counsel, detailed defense counsel, and personnel of the originating agency who have appropriate level security clearances, receives access to any classified information, that person shall be served with a copy of these Procedures and shall execute the written agreement set forth in paragraph 3.e.

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The Procedures shall apply to any defense counsel of the accused, and to any other persons who may later receive classified information from the Department of the Army or Department of State in connection with this case.

- Handling and Protection of Classified Information.

a. All counsel shall seek guidance from the Investigation Security Officer with regard to appropriate storage and use of classified information.

b. The Investigation Security Officer will provide appropriate physical security protection for any materials prepared or compiled by the defense, or by any person in relation to the preparation of the accused's defense or submission under MRE 505. The materials and documents (defined above) requiring physical security include, without limitation, any notes, carbon papers, letters, photographs, drafts, discarded drafts, memoranda, typewriter ribbons, magnetic recording, or other documents of any kind or description. Classified materials prepared by the defense shall be maintained by the Investigation Security Officer in a separate sealed container to which only the defense counsel shall have access.

c. Classified documents and information, or information believed to be classified shall be discussed only in an area approved by the Investigation Security Officer, and in which persons not authorized to possess such information cannot overhear such discussions.

d. No one shall discuss any classified information over any standard commercial telephone instrument or any inter-office communication system, or in the presence of any person who is not authorized to possess such information.

e. Written materials prepared for this case by the accused or defense counsel shall be transcribed, recorded, typed, duplicated, copied or otherwise prepared only by persons who are cleared for access to such information.

f. All mechanical devices of any kind used in the preparation or transmission of classified information in this case may be used only with the approval of the Investigation Security Officer and in accordance with instructions he or she shall issue.

g. Upon reasonable advance notice of the Investigation Security Officer, defense counsel shall be given access during normal business hours, and at other times on reasonable request, to classified national security documents which the government is required to make available to defense counsel but elects to keep in its possession. Persons permitted to inspect classified documents by these Procedures may make written notes of the documents and their contents. Notes of any classified portions of these documents, however, shall not be disseminated or disclosed in any manner or form to any person not subject to these Procedures. Such notes will be secured in accordance with the terms of these Procedures. Persons permitted to have access to classified documents will be allowed to view their notes within an area designated by the Investigation Security Officer. No person permitted to inspect classified documents by these Procedures, including defense counsel, shall copy or reproduce any part of said documents or

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their contents in any manner or form, except as provided by the Investigation Security Officer, after he or she has consulted with the Convening Authority.


k. Without prior authorization of the Department of the Army or Department of State, there shall be no disclosure to anyone not named in these Procedures by persons who may later receive a security clearance or limited access authorization from the Department of the Army or Department of State in connection with this case (except to or from government employees acting in the course of their official duties) of any classified national security information or national security document (or information contained therein) until such time, if ever, that such documents or information are declassified.

j. The defense shall not disclose the contents of any classified documents or information to any person except those persons identified to them by the Investigating Officer as having the appropriate clearances, and a need to know.

j. All persons given access to classified information pursuant to these Procedures are advised that all information to which they obtain access by these Procedures is now and will forever remain the property of the United States Government. They shall return all materials which may have come into their possession, or for which they are responsible because of such access, upon demand by the Investigation Security Officer.

k. A copy of these Procedures shall issue forthwith to defense counsel, with further order that the defense counsel advise the accused named herein of the contents of these Procedures, and furnish him a copy. The accused, through defense counsel, shall forthwith sign the statements set forth in paragraph 3.f of these Procedures, and counsel shall forthwith file an original with the Investigating Officer and provide an original, each to the Investigation Security Officer and the Government Counsel. The signing and filing of this statement by the accused is a condition precedent to the disclosure of classified information to the accused.

5. Nothing contained in these Procedures shall be construed as waiver of any right of the accused.


TERRY A. WOLF
Major General, USA
Commanding

DISTRIBUTION:
Investigating Officer
Trial Counsel
Defense Counsel



REF. TO
ATTENTION OF

DEPARTMENT OF THE ARMY
HEADQUARTERS, 1ST ARMORED DIVISION AND
UNITED STATES DIVISION-CENTER
CAMP LIBERTY, IRAQ
APO AE 09344

28 JUL 2000

AEIV-THZ

MEMORANDUM FOR S&F DISTRIBUTION

SUBJECT: Protective Order

1. In order to protect the national security and pursuant to the authority granted under Military Rule of Evidence (MRE) 505, relevant executive orders of the President of the United States, and regulations of the Department of the Army, I ORDER:

a. The following security procedures, MRE 505, and the authorities referred to above will apply to all matters concerning the investigation into alleged offenses, pre-trial negotiations, and Article 32, Uniform Code of Military Justice (UCMJ), pre-trial investigation in this case:

b. As used herein, the term "classified information or document" refers to:

(1) any classified document (or information contained therein);

(2) information known by the accused or defense counsel to be classifiable;

(3) classified documents (or information contained therein) disclosed to the accused or defense counsel as part of the proceedings in this case;

(4) classified documents and information which have otherwise been made known to the accused or defense counsel, and which have been marked or described as: "CONFIDENTIAL," "SECRET," or "TOP SECRET."

c. All such classified documents and information contained therein shall remain classified unless they bear a clear indication that they have been officially declassified by the Government agency or department that originated the document or the information contained therein (hereinafter referred to as the "originating agency").

d. The words "documents" or "associated materials" as used in this Order include, but are not limited to, all written or printed matter of any kind, formal or informal, including the originals and all non-identical copies, whether different from the original, by reason of any notation made on such copies or otherwise, including, without limitation, papers, correspondence, memoranda, notes, letters, telegrams, reports, summaries, inter-office and intra-office communications, notations of any sort, bulletins, teletypes, telex, invoices, worksheets, and all drafts, alterations, modifications, changes and amendment of any kind to the foregoing, graphic or aural records or representations of any kind, including, without limitation, photographs, charts, graphs, microfiche, microfilm, video tapes, sound recordings of any kind,

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motion pictures, any electronic, mechanical or electric records or representations of any kind, including without limitation, tapes, cassettes, discs, recording, films, typewriter ribbons and word processor discs or tapes.

e. The word "or" should be interpreted as including "and" and vice versa.

f. Those named herein are advised that direct or indirect unauthorized disclosure, retention, or negligent handling of classified information could cause serious and, in some cases, exceptionally grave damage to the national security of the United States, or may be used to the advantage of a foreign nation against the interests of the United States. These Security Procedures are to ensure that persons subject to these Procedures will never divulge the classified information disclosed to them to anyone who is not authorized by the originating agency and in conformity with these procedures.

g. Persons subject to these Procedures are admonished that they are obligated by law and regulation not to disclose any classified national security information in an unauthorized fashion.

h. Persons subject to these Procedures are admonished that any breach of these Procedures may result in the termination of their access to classified information. In addition, they are admonished that any unauthorized disclosure, possession or handling of classified information may constitute violations of United States criminal laws, including but not limited to, the provisions of Sections 641, 793, 794, 798 and 952, Title 18, United States Code, and Sections 421 and 783(b), Title 50, United States Code. In addition, for those persons who are attorneys, a report will be filed with their State Bar Association.

2. Information in the public domain is ordinarily not classified. However, if classified information is reported in the press or otherwise enters the public domain, the information does not lose its classified status merely because it is in the public domain. Any attempt by the defense to have classified information that has been reported in the public domain but which is known or has reason to believe is classified, confirmed, or denied at trial or in any public proceeding in this case shall be governed by Section 3 of the Classified Information Procedures Act, 18 U.S. Code Appendix III.

3. Personnel Security Investigations and Clearances. This case will involve classified national security information or documents, the storage, handling, and control of which requires special security precautions mandated by statute, executive orders, and regulations, and access to which requires a special security clearance.

a. The Convening Authority has been advised that the Investigating Officer has the requisite security clearance to have access to the classified information and documents which will be at issue in this case. The Investigating Officer is to have unfettered access to that classified information necessary to prepare for this investigation, subject to requirement in paragraph 3.g. below.

b. The Convening Authority has been advised that the government trial counsel working on this case have the requisite security clearances to have access to the classified information and

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documents which will be at issue in this case. The government trial counsel are to have unfettered access to classified information necessary to prepare for this investigation, subject to the requirements in paragraph 3.g. below

e. The Convening Authority has been advised that Private First Class (PFC) Bradley Manning's detailed defense counsel have the requisite security clearance to have access to the relevant and necessary classified information and documents which will be at issue in this case. As a condition of receiving classified information, the detailed defense counsel agree to the conditions specified herein this order

f. As a condition of receiving classified information, any retained defense counsel will agree to the conditions specified herein and execute all necessary forms so that the Government may complete the necessary personnel security background investigation to make a determination whether defense counsel is eligible for a limited access authorization. Any retained defense counsel will also sign the statement in paragraph 3.e. Upon the execution and filing of the statements set forth in paragraphs 3.e and 3.f by any retained defense counsel requiring access to classified information, the Government shall undertake, as expeditiously as possible, the required inquiries to ascertain defense counsel's eligibility for access to classified information.

g. There are two conditions precedent to obtaining access to the classified information at issue in this case

(1) All individuals, other than the Investigating Officer, Government and detailed defense counsels and personnel of the originating agency, can obtain access only after having provided the necessary information required for, and having been granted, a security clearance or Limited Access Authorization by the Department of the Army or Department of State, through the Investigation Security Officer; and

(2) Each person, other than the Department of Army employees named herein and personnel of the originating agency, before being granted access to classified information must also sign a sworn statement that states:

MEMORANDUM OF UNDERSTANDING

I, _____, understand that I may be the recipient of information and intelligence that concerns the security of the United States and that belongs to the United States. This information and intelligence, together with the methods of collecting and handling it, are classified according to security standards established by the U.S. Government. I have read and understand the provisions of the espionage laws (Sections 793, 794 and 798 of title 18, United States Code) concerning the disclosure of information relating to the national defense and the provisions of the Intelligence Identities Protection Act (Section 421 of title 50, United States Code) and I am familiar with the penalties provided for the violation thereof.

2. I agree that I will never divulge, publish or reveal, either by word, conduct, or any other means, such information or intelligence unless specifically authorized in writing to do so by an authorized representative of the U.S. Government or as otherwise ordered by the Court. I further agree to submit for prepublication review any article, speech, or other publication derived from or based upon experience or information gained in the course of United States v. Private First Class Bradley E. Manning. I understand this review is solely to ensure that no classified national security information is contained therein.

3. I understand that this agreement will remain binding upon me after the conclusion of the proceedings in the case of United States v. Private First Class Bradley E. Manning.

4. I have received, read and understand the Security Procedures entered by the Convening Authority on 2010 in the case of United States v. Private First Class Bradley E. Manning relating to classified information, and I agree to comply with the provisions thereof.

Signature Date

Any MOU with a retained defense counsel shall include a statement expressing his understanding that the failure to abide by the terms of these Security Procedures will result in a report to his State Bar Association. Each such person executing the above statement must file an original with the Investigating Officer and provide an original each to the Investigation Security Officer and the Government Counsel.

f. In addition to signing the MOU in paragraph 3.e, any person who, as a result of this investigation, gains access to information contained in any Department of the Army Special Access Program, as that term is defined in section 4.2 of Executive Order 12356, to Sensitive Compartmented Information (SCI), or to any information subject to Special Category (SPECAT) handling procedures, shall sign any non-disclosure agreement which is specific to that Special Access Program, Sensitive Compartmented Information, or SPECAT information.

g. All other requests for clearances for access to classified information in this case by persons not named in these Procedures, or requests for clearances for access to information at a higher level of classification, shall be made to the Investigation Security Officer, who, upon approval of the Convening Authority, shall promptly process the requests.

h. Before any person subject to these Security Procedures, other than government trial counsel, detailed defense counsel, and personnel of the originating agency who have appropriate level security clearances, receives access to any classified information, that person shall be served with a copy of these Procedures and shall execute the written agreement set forth in paragraph 3.e.

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SUBJECT: Protective Order

The Procedures shall apply to any defense counsel, of the accused, and to any other persons who may later receive classified information from the Department of the Army or Department of State in connection with this case.

- Handling and Protection of Classified Information.

a. All counsel shall seek guidance from the Investigation Security Officer with regard to appropriate storage and use of classified information.

b. The Investigation Security Officer will provide appropriate physical security protection for any materials prepared or compiled by the defense, or by any person in relation to the preparation of the accused's defense or submission under MRE 505. The materials and documents (defined above) requiring physical security include, without limitation, any notes, carbon papers, letters, photographs, drafts, discarded drafts, memoranda, typewriter ribbons, magnetic recording, or other documents of any kind or description. Classified materials prepared by the defense shall be maintained by the Investigation Security Officer in a separate sealed container to which only the defense counsel shall have access.

c. Classified documents and information, or information believed to be classified shall be discussed only in an area approved by the Investigation Security Officer, and in which persons not authorized to possess such information cannot overhear such discussions.

d. No one shall discuss any classified information over any standard commercial telephone instrument or any inter-office communication system, or in the presence of any person who is not authorized to possess such information.

e. Written materials prepared for this case by the accused or defense counsel shall be transcribed, recorded, typed, duplicated, copied or otherwise prepared only by persons who are cleared for access to such information.

f. All mechanical devices of any kind used in the preparation or transmission of classified information in this case may be used only with the approval of the Investigation Security Officer and in accordance with instructions he or she shall issue.

g. Upon reasonable advance notice of the Investigation Security Officer, defense counsel shall be given access during normal business hours, and at other times on reasonable request, to classified national security documents which the government is required to make available to defense counsel but elects to keep in its possession. Persons permitted to inspect classified documents by these Procedures may make written notes of the documents and their contents. Notes of any classified portions of these documents, however, shall not be disseminated or disclosed in any manner or form to any person not subject to these Procedures. Such notes will be secured in accordance with the terms of these Procedures. Persons permitted to have access to classified documents will be allowed to view their notes within an area designated by the Investigation Security Officer. No person permitted to inspect classified documents by these Procedures, including defense counsel, shall copy or reproduce any part of said documents or

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SUBJECT: Protective Order

their contents in any manner or form, except as provided by the Investigation Security Officer, after he or she has consulted with the Convening Authority.


h. Without prior authorization of the Department of the Army or Department of State, there shall be no disclosure to anyone not named in these Procedures by persons who may later receive a security clearance or limited access authorization from the Department of the Army or Department of State in connection with this case (except to or from government employees acting in the course of their official duties) of any classified national security information or national security document (or information contained therein) until such time, if ever, that such documents or information are declassified.

i. The defense shall not disclose the contents of any classified documents or information to any person except those persons identified to them by the Investigating Officer as having the appropriate clearances, and a need to know.

j. All persons given access to classified information pursuant to these Procedures are advised that all information to which they obtain access by these Procedures is now and will forever remain the property of the United States Government. They shall return all materials which may have come into their possession, or for which they are responsible because of such access, upon demand by the Investigation Security Officer.

k. A copy of these Procedures shall issue forthwith to defense counsel, with further order that the defense counsel advise the accused named herein of the contents of these Procedures, and furnish him a copy. The accused, through defense counsel, shall forthwith sign the statements set forth in paragraph 3.f of these Procedures, and counsel shall forthwith file an original with the Investigating Officer and provide an original each to the Investigation Security Officer and the Government Counsel. The signing and filing of this statement by the accused is a condition precedent to the disclosure of classified information to the accused.

5. Nothing contained in these Procedures shall be construed as waiver of any right of the accused.


TERRY A. WOLF
Major General, USA
Commanding

DISTRIBUTION:
Investigating Officer
Trial Counsel
Defense Counsel



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
JOINT BASE MYER-HENDERSON HALL
204 LEE AVENUE
FORT MYER, VIRGINIA 22211-1199

IMND-MHH-ZA

22 Jun 11

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Protective Order for Secretary of the Army AR 15-6 Investigation – United States v. PFC Bradley Manning

1. **PURPOSE.** The purpose of this protective order is to prevent the unauthorized disclosure or dissemination of the AR 15-6 Investigation ordered by the Secretary of the Army (hereinafter "SecArmy AR 15-6 Investigation"). This protective order covers all documents and information that are part of the SecArmy AR 15-6 Investigation, including those that have been, or will be, reviewed or made available to the accused, defense counsel, and other recipients of the SecArmy AR 15-6 Investigation in this case.

2. **APPLICABILITY.** Without authorization from me, defense counsel shall not disclose or distribute the SecArmy AR 15-6 Investigation to any person or entity other than the following "authorized recipients": (a) other defense counsel of record for the accused; (b) the accused; (c) any associate, paralegal, or clerical employee involved in the defense of the accused; (d) the Article 32 Investigating Officer; (e) third parties whose testimonies are taken in this action, but only to the extent necessary to elicit testimony concerning the statement; and (f) independent experts needed to provide technical or expert services or testimony in the prosecution of the accused.

3. **ORDER.** In order to comply with the guidelines set forth by the releasing authority, it is hereby ORDERED:

a. Authorized recipients shall not disclose the contents of the SecArmy AR 15-6 Investigation to any person not named above. Defense counsel may only provide the SecArmy AR 15-6 Investigation to the above authorized recipients when necessary for the purpose of preparing a defense to the charges pending against the accused.

b. The procedures set forth in this protective order apply to the SecArmy AR 15-6 Investigation disclosed in this case, including all evidence and documents previously disclosed during discovery that were included or referenced in the SecArmy AR 15-6 Investigation.

c. The term "SecArmy AR 15-6 Investigation" refers to all documents and information gathered as part of the SecArmy AR 15-6 Investigation, all documents and information produced during the SecArmy AR 15-6 Investigation, and all documents and information produced as a result of the SecArmy AR 15-6 Investigation, including, but not limited to, records of adverse action taken as a result of the SecArmy AR 15-6 Investigation and supporting documents.

SUBJECT: Protective Order for the Secretary of the Army AR 15-6 Investigation – United States v. PFC Bradley Manning

d. The words "documents" or "information" as used in this protective order include, but are not limited to, all written or printed matter of any kind, formal or informal, including the originals and all non-identical copies, whether different from the original by reason of any notation made on such copies or otherwise, including, without limitation, papers, correspondence, memoranda, notes, letters, telegrams, reports; summaries, inter-office and intra-office communications, notations of any sort, bulletins, teletypes, telefax, invoices, worksheets, and all drafts, alterations, modifications, changes, and amendment of any kind to the foregoing, graphic or aural records or representations of any kind, including, without limitation, photographs, charts, graphs, microfiche, microfilm, video tapes, sound recordings of any kind, motion pictures, any electronic, mechanical or electric records or representations of any kind, including, without limitation, tapes, cassettes, CDs, DVDs, thumbdrives, hard drives, other recordings, films, typewriter ribbons and word processor discs or tapes.

e. The word "or" should be interpreted as including "and," and vice versa; "he" should be interpreted as including "she," and vice versa.

f. Authorized recipients must sign a written acknowledgment (enclosed) that they are bound by the terms of this protective order as a condition precedent to the disclosure of information.

g. Defense counsel shall prepare a list of the names of all persons to whom the SecArmy AR 15-6 Investigation is disclosed and obtain a copy of their signed acknowledgments. Defense counsel will file the list and acknowledgments with the trial counsel prior to receiving the SecArmy AR 15-6 Investigation. Prior to any additional disclosure of the SecArmy AR 15-6 Investigation, defense counsel must supplement the list and file additional acknowledgments with the trial counsel.

h. Upon termination of all proceedings, if any, the SecArmy AR 15-6 Investigation shall be returned to the trial counsel.

i. If authorized recipients are uncertain whether documents or information are covered by this protective order, they must confirm with me through the trial counsel.

j. Authorized recipients are advised that a violation of this protective order will result in my review of the access procedures utilized in this case and may limit ease of access to all evidence related to this case in the future.

4. **MODIFICATION.** Should the accused or any other party listed in paragraph 2 wish to disclose the investigation or any information contained therein to any person or for any purpose other than those indicated in paragraph 2, they may, upon written request, seek modification of this protective order through the trial counsel to me.

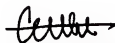
5. **NOTIFICATION.** If you suspect or have reason to believe that any unauthorized disclosure of all or part of the SecArmy AR 15-6 Investigation has occurred, notify me through the trial counsel as soon as practicably possible.

IMND-MHH-ZA

SUBJECT: Protective Order for the Secretary of the Army AR 15-6 Investigation – United States v. PFC Bradley Manning

6. Nothing contained in this protective order shall be construed as a waiver of any right of the accused.

Encl
Acknowledgment


CARL R. COFFMAN, JR
COL, AV
Commanding

DISTRIBUTION: (w/encl)
Defense Counsel
Accused
Article 32 Investigating Officer

MEMORANDUM FOR Convening Authority

SUBJECT: Acknowledgment of Protective Order for the Secretary of the Army AR 15-6 Investigation – United States v. PFC Bradley Manning

1. I, _____, have read and understand the protective order, dated 22 June 2011, relating to the SecArmy AR 15-6 Investigation, and I agree to comply with the provisions thereof. I understand that further disclosure of the SecArmy AR 15-6 Investigation is unauthorized unless the disclosure adheres to the requirements of the protective order.
2. I understand that the unauthorized disclosure, unauthorized retention, and negligent handling of the SecArmy AR 15-6 Investigation will result in the Convening Authority's review of the access procedures utilized in this case and may limit ease of access to all evidence related to this case in the future.
3. If I am uncertain about whether documents or information are covered by this protective order, I understand that I must confirm with the Convening Authority through the trial counsel.
4. I understand that I remain bound to this agreement after the conclusion of all proceedings, if any, in the above referenced case. Upon termination of all proceedings, the sensitive information disclosed in this case shall be returned to the trial counsel.

DATE

SIGNATURE



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
JOINT BASE MYER-HENDERSON HALL
204 LEE AVENUE
FORT MYER, VIRGINIA 22211-1199

IMND-MHH-ZA

22 Jun 11

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Protective Order for Law Enforcement Sensitive Information and Other Sensitive Information – United States v. PFC Bradley Manning

1. **PURPOSE.** The purpose of this protective order is to prevent the unauthorized disclosure or dissemination of law enforcement sensitive information, grand jury information, search warrant documents, and applications and orders pursuant to 18 U.S.C. § 2703(d) (hereinafter “sensitive information”). This protective order covers all sensitive information previously available to the accused, defense counsel, or other authorized recipients in the course of this case or which will be made available to the accused, defense counsel, and other authorized recipients of sensitive information in this case.

2. **APPLICABILITY.** Without authorization from me, defense counsel shall not disclose or distribute sensitive information to any person or entity other than the following “authorized recipients”: (a) other defense counsel of record for the accused; (b) the accused; (c) any associate, paralegal, or clerical employee involved in the defense of the accused; (d) the Article 32 Investigating Officer; (e) third parties whose testimonies are taken in this action, but only to the extent necessary to elicit testimony concerning the statement; and (f) independent experts needed to provide technical or expert services or testimony in the prosecution of the accused.

3. **ORDER.** In order to protect sensitive information, it is hereby ORDERED:

a. Authorized recipients shall not disclose sensitive information to any person not named above. Defense counsel may only provide sensitive information to the above authorized recipients when necessary for the purpose of preparing a defense to the charges pending against the accused.

b. The procedures set forth in this protective order apply to sensitive information disclosed in this case, including all sensitive documents and associated materials previously disclosed during discovery.

c. The term “sensitive information” refers to:

(1) all law enforcement sensitive information and documents (or information contained or referenced therein) disclosed to authorized recipients as part of the proceedings in this case, including without limitation, U.S. Army Criminal Investigation Command reports and exhibits, Federal Bureau of Investigation reports and exhibits, Diplomatic Security Service reports and

SUBJECT: Protective Order for Law Enforcement Sensitive Information and Other Sensitive Information – United States v. PFC Bradley Manning

exhibits, and other law enforcement sensitive reports, operational details and reports, investigative details and reports, and any attachments thereto;

- (2) any information related to the locations, functions, or activities of any Cryptologic Support Teams or any member thereof;
- (3) all federal district court documents and associated materials disclosed to authorized recipients as part of the proceedings in this case, including without limitation, grand jury information, search warrant documents, and applications and orders pursuant to 18 U.S.C. § 2703(d); and
- (4) information and documents known or that reasonably should be known by authorized recipients to be sensitive information.

d. The words "documents" or "associated materials" as used in this protective order include, but are not limited to, all written or printed matter of any kind, formal or informal, including the originals and all non-identical copies, whether different from the original by reason of any notation made on such copies or otherwise, including, without limitation, papers, correspondence, memoranda, notes, letters, telegrams, reports, summaries, inter-office and intra-office communications, notations of any sort, bulletins, teletypes, telefax, invoices, worksheets, and all drafts, alterations, modifications, changes, and amendment of any kind to the foregoing, graphic or aural records or representations of any kind, including, without limitation, photographs, charts, graphs, microfiche, microfilm, video tapes, sound recordings of any kind, motion pictures, any electronic, mechanical or electric records or representations of any kind, including, without limitation, tapes, cassettes, CDs, DVDs, thumbdrives, hard drives, other recordings, films, typewriter ribbons and word processor discs or tapes.

e. The word "or" should be interpreted as including "and," and vice versa; "he" should be interpreted as including "she," and vice versa.

f. Authorized recipients must sign a written acknowledgment (enclosed) that they are bound by the terms of this protective order as a condition precedent to the disclosure of information.

g. Authorized recipients must also sign a copy of any relevant district court disclosure and protective order after having read the protective order and having the contents of the protective order fully explained to them by defense counsel.

h. Defense counsel shall prepare a list of the names of all persons to whom sensitive information is disclosed and obtain a copy of their signed acknowledgments. Defense counsel will file the list and acknowledgments with the trial counsel prior to receiving the protected sensitive information. Prior to any additional disclosure of sensitive information, defense counsel must supplement the list and file additional acknowledgments with the trial counsel.

IMND-MHH-ZA

SUBJECT: Protective Order for Law Enforcement Sensitive Information and Other Sensitive Information – United States v. PFC Bradley Manning

i. Upon termination of all proceedings, if any, the sensitive information disclosed in this case shall be returned to the trial counsel.

j. If authorized recipients are uncertain whether documents or information are covered by this protective order, they must confirm with me through the trial counsel.

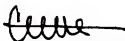
k. Authorized recipients are advised that a violation of this protective order will result in my review of the access procedures utilized in this case and may limit ease of access to all evidence related to this case in the future. Violations of this protective order may also violate federal district court disclosure and protective orders and will result in the forwarding of your name to the U.S. Attorney's Office for the Eastern District of Virginia.

4. **MODIFICATION.** Should the accused or any other party listed in paragraph 2 wish to disclose sensitive information to any person or for any purpose other than those indicated in paragraph 2, they may, upon written request, seek modification of this protective order through the trial counsel to me.

5. **NOTIFICATION.** If you suspect or have reason to believe that any unauthorized disclosure of sensitive information has occurred, notify me through the trial counsel as soon as practicably possible.

6. Nothing contained in this protective order shall be construed as a waiver of any right of the accused.

Encl
Acknowledgment


CARL R. COFFMAN, JR
COL, AV
Commanding

DISTRIBUTION: (w/encl)
Defense Counsel
Accused
Article 32 Investigating Officer

MEMORANDUM FOR Convening Authority

SUBJECT: Acknowledgment of Protective Order for Law Enforcement Sensitive Information and Other Sensitive Information – United States v. PFC Bradley Manning

1. I, _____, have read and understand the protective order, dated 22 June 2011, relating to sensitive information, and I agree to comply with the provisions thereof. I understand that further disclosure of this sensitive information is unauthorized unless the disclosure adheres to the requirements of the protective order.
2. I understand that the unauthorized disclosure, unauthorized retention, and negligent handling of this sensitive information will result in the Convening Authority's review of the access procedures utilized in this case and may limit ease of access to all evidence related to this case in the future. Violations of this protective order may also violate federal district court disclosure and protective orders and will result in the forwarding of my name to the U.S. Attorney's Office for the Eastern District of Virginia. I understand that I also must sign a copy of any relevant district court disclosure and protective order as a condition precedent to receiving grand jury information, search warrant documents, and applications and orders pursuant to 18 U.S.C. § 2703(d).
3. If I am uncertain about whether documents or information are covered by this protective order, I understand that I must confirm with the Convening Authority through the trial counsel.
4. I understand that I remain bound to this agreement after the conclusion of all proceedings, if any, in the above referenced case. Upon termination of all proceedings, the sensitive information disclosed in this case shall be returned to the trial counsel.

DATE

SIGNATURE

Appellate Exhibit 39
Enclosure 4
57 pages
ordered sealed for Reason 6
Military Judge's Seal Order
dated 20 August 2013
stored in the original Record
of Trial

Appellate Exhibit 39
Enclosure 5
32 pages
ordered sealed for Reason 6
Military Judge's Seal Order
dated 20 August 2013
stored in the original Record
of Trial

IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES)

v.)

MANNING, Bradley E., PFC)

U.S. Army, xxx-xx-)

Headquarters and Headquarters Company, U.S.)

Army Garrison, Joint Base Myer-Henderson Hall,)

Fort Myer, VA 22211)

**DEFENSE REQUEST FOR
LEAVE TO FILE THE
18 U.S.C. SECTION 793(e)
ON 10 MAY 2012**

DATED: 28 March 2012

1. The Defense requests leave of the Court to file its Motion to Dismiss All Charges Offenses under 18 U.S.C. Section 793(e) until 10 May 2012.

2. The 10 May 2012 filing date is the next filing date for legal motions. Under the Defense's Proposed Case Management Order, we intend to recommend that the Court consider the following motions at the subsequent motions hearing:

a. Proposed Members Instructions, including elements for Article 92, Article 104, Article 134, Specifications 1 through 16;

b. Prosecution Request for Instructions for Lesser Included Offenses;

c. Defense Request for Instructions for Lesser Included Offenses;

d. Government Motion Regarding R.C.M. 701 and M.R.E. 505 (issues dealing with the following: R.C.M. 701(g)(2) review; limited disclosure requests under M.R.E. 505(g)(2); claims of privilege under M.R.E. 505(c); procedures under M.R.E. 505(f); and in camera proceeding under M.R.E. 505(i));

e. Defense Motion to Dismiss 18 U.S.C. Section 1030(a)(1) Offenses;

f. Defense Motion to Dismiss 18 U.S.C. Section 793(e) Offenses; and

g. Updated Proposed Case Calendar

3. The Defense's request will not necessitate any delay in the proceedings. Instead, it simply moves the 18 U.S.C. Section 793(e) motion from being considered on the 24 through 26th April session to the following session. Moreover, this motion will be considered with a similar motion dealing with 18 U.S.C. Section 1030(a)(1) offenses. As such, there is no prejudice to the Government in moving the requested motion, nor is there a delay in the proceedings.

4. The point of contact for this memorandum is the undersigned at (401) 744-3007 or by e-mail at coombs@armycourtmartrialdefense.com.

Respectfully submitted,



DAVID EDWARD COOMBS
Civilian Defense Counsel

IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES

v.

MANNING, Bradley E., PFC
U.S. Army, xxx-xx-
Headquarters and Headquarters Company,
U.S. Army Garrison, Joint Base Myer-
Henderson Hall, Fort Myer, VA 22211


)
)
) **RULING: DEFENSE REQUEST**
) **FOR LEAVE TO FILE**
) **18 U.S.C. SECTION 793(e)**
) **on 10 May 2012**

)
) **DATED: 29 March 2012**

The Defense has requested leave of the Court to continue the date of filing of its Motion to Dismiss All Charged Offenses under Section 793(e) from 29 March 2012 to 10 May 2012. The Government does not oppose.

RULING: The Defense Request is **GRANTED**.

So ORDERED: this 29th day of March 2012.


DENISE R. LIND
COL, JA
Chief Judge, 1st Judicial Circuit

UNITED STATES OF AMERICA)

v.)

Manning, Bradley E.
PFC, U.S. Army,
HHC, U.S. Army Garrison,
Joint Base Myer-Henderson Hall
Fort Myer, Virginia 22211)

Prosecution Response

**to Defense Motion to Dismiss All Charges
With Prejudice**

12 April 2012

RELIEF SOUGHT

The prosecution respectfully requests the Court deny the Defense Motion to Dismiss All Charges with Prejudice (the "Defense Motion") on three grounds: first, the prosecution is in compliance with its discovery obligations; second, even assuming, *arguendo*, an alleged discovery error took place, dismissal of all charges with prejudice is an improper and unjust remedy; and third, there is no legal authority to support dismissal of all charges with prejudice under the facts.

BURDEN OF PERSUASION AND BURDEN OF PROOF

As the moving party, the Defense bears the burden of persuasion and must prove any factual issues necessary to decide this motion by a preponderance of the evidence. See Manual for Courts-Martial (MCM), United States, Rule for Courts-Martial (RCM) 905(c) (2008).

FACTS

On 3 February 2012, the case was referred to a general court-martial.

On 16 March 2012, the Court issued a Protective Order relating to information in this case.

On 23 March 2012, the Court ordered the prosecution to produce, inspect, or disclose to the Court for *in camera* review materials subject to the Defense's Motion to Compel Discovery. See Enclosure 1. The Court also ordered the prosecution to notify the Court whether it anticipates any government entity subject to the Motion to Compel Discovery will seek limited disclosure of classified information under MRE 505(g)(2) or to claim a privilege under MRE 505(c). See id.

Since early Fall 2010, the prosecution identified the departments, agencies, and military commands whose files it is required to search for discoverable information. See United States v. Williams, 50 M.J. 436, 441 (C.A.A.F. 1999). On or about 25 May 2011, the prosecution began requesting that those specific entities segregate for the prosecution to inspect and preserve any records related to the accused, WikiLeaks, and the evidence in this case. See id., at 441; see also Enclosure 4. Based on reviewing those entities' documents, reviewing new evidence, and any

APPELLATE EXHIBIT 42
PAGE REFERENCED:
PAGE OF PAGES

other reasonable means of learning of new information, the prosecution subsequently developed a good faith basis that additional discoverable files may be located at other departments, agencies, and military commands. The prosecution submitted a further request to those entities to segregate and preserve those records related to the accused, WikiLeaks, and the evidence in this case, or submitted requests to those entities for specific information that is potentially discoverable. In total, the prosecution requested thirteen departments, agencies, and military commands to segregate and preserve such records. Furthermore, the prosecution requested specific information that is potentially discoverable from more than fifty additional departments and agencies. See Enclosure 6, Section V, para. 1(C). The prosecution searched, and continues to search, those files for discoverable information under RCM 701(a)(6) and applicable case law, to include Brady and its progeny.¹

The prosecution has disclosed all known, unclassified, discoverable information within the possession, custody, or control of military authorities. The prosecution has disclosed all known, classified, discoverable information within the possession, custody, or control of military authorities for which the prosecution has authority to disclose. The prosecution is in the process of disclosing all remaining known, classified, discoverable information within the possession, custody, or control of military authorities for which the issuance of a protective order under Military Rule of Evidence (MRE) 505(g) was required and the classified information privilege will not be invoked. In addition, the prosecution is currently conducting a search of the hard drives subject to the Order relating to the Defense Motion to Compel Discovery and will disclose the results to the defense. See Enclosure 1.

The prosecution has disclosed all known, unclassified, discoverable information outside the possession, custody, or control of military authorities. The prosecution has disclosed all known, classified, discoverable information outside the possession, custody, or control of military authorities for which the prosecution has authority to disclose. The prosecution is in the process of disclosing all remaining known, classified, discoverable information outside the possession, custody, or control of military authorities for which the issuance of a protective order under MRE 505(g) was required and the classified information privilege will not be invoked.

To date, the prosecution has produced 2,729 unclassified documents, totaling 81,273 pages, and 41,550 classified documents, totaling 336,641 pages. See Enclosure 5.

WITNESSES/EVIDENCE

The prosecution does not request any witness be produced for this Motion. The prosecution requests that the Court consider the following enclosures to this Motion in its ruling.

1. Ruling: Defense Motion to Compel Discovery, 23 March 2012 (Appellate Exhibit XXXVI)

¹ The prosecution also continues to notate any potential Jencks or Giglio material contained therein. If the defense requested inspection of those files within the possession, custody, or control of military authorities, RCM 701(a)(2) applies.

2. Defense Reply to Prosecution Response to Defense Motion to Compel Discovery, 13 March 2012 (Appellate Exhibit XXVI)
3. Defense Motion to Dismiss All Charges with Prejudice, 15 March 2012 (Appellate Exhibit XXXI)
4. Enclosure 3 to Prosecution Supplement to Prosecution Proposed Case Calendar, Sample Search and Preservation Request, Defense Intelligence Agency, 25 May 2011 (Appellate Exhibit XII)
5. Transmittal Record, DA Form 200, 15 March 2012
6. Prosecution Supplement to Prosecution Proposed Case Calendar, 8 March 2012 (Appellate Exhibit XII)
7. Prosecution Proposed Case Calendar, 21 February 2012 (Appellate Exhibit I)

LEGAL AUTHORITY AND ARGUMENT

The prosecution requests that the Court deny the Defense Motion on three grounds: first, the prosecution is in compliance with its discovery obligations; second, even assuming, *arguendo*, an alleged discovery error took place, dismissal of all charges with prejudice is an improper and unjust remedy; and third, there is no legal authority to support dismissal of all charges with prejudice under the facts.

I: THE PROSECUTION IS IN COMPLIANCE WITH ITS DISCOVERY OBLIGATIONS.

The prosecution largely agrees with the defense's recitation of the discovery rules in its Reply to the Prosecution Response to the Defense's Motion to Compel Discovery. See Enclosure 2. The prosecution shall permit the defense, upon request, to inspect records "within the possession, custody, or control of military authorities" that are "material to the preparation of the defense" and shall disclose information that reasonable tends to negate guilt, reduce the degree of guilt, or reduce the punishment. RCM 701(a)(2); see also RCM 701(a)(6) (stating that trial counsel shall provide to the defense that which "reasonably tends to negate the guilt of the accused of an offense charged, reduce the degree of guilt of the accused of an offense charged, or reduce the punishment").

The prosecution also bears discovery obligations under Brady and its progeny. See Brady v. Maryland, 373 U.S. 83, 87 (1963). The prosecution shall disclose evidence that is favorable to the accused and material to guilt or punishment. See id., at 87. The prosecution shall *always* produce Brady evidence. See Skinner v. Switzer, 131 S.Ct. 1289, 1292 (2011) (noting that Brady "announced a constitutional requirement addressed to the prosecution's conduct pretrial"); see also Pennsylvania v. Ritchie, 480 U.S. 39, 59 (1987) (stating that "it is the [government] that decides which information must be disclosed" under Brady).

The accused's charged misconduct, significant in both volume and substance, caused a widespread government response, spanning multiple Executive Branch departments, agencies, and military commands. See Enclosure 6. The facts set forth in this Motion outline those steps the prosecution undertook, and continues to undertake, to satisfy its discovery obligations, in light of the accused's charged misconduct.

The prosecution has, and will continue to, mirror the open file discovery system as much as practicable, taking into consideration the national security concerns relating to that which may be discoverable. See RCM 701(a) analysis (“[M]ilitary discovery practice has been quite liberal.”); see also UCMJ art. 46 (2008) (“The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe.”). To date, the prosecution has produced 2,729 unclassified documents, totaling 81,273 pages, and 41,550 classified documents, totaling 336,641 pages. See Enclosure 5. Much of the information, discoverable or not, is owned by other government agencies and may contain multiple equity holders, requiring interagency coordination. See Enclosure 6. The prosecution will continue to coordinate expeditiously with those entities to ensure the accused receives a speedy and fair trial.

The defense alleges that the prosecution has committed discovery violations, to include a violation of Brady and RCM 701(a)(2). See Enclosure 3. The three components of a discovery violation are as follows: first, that the evidence is discoverable; second, that the evidence was suppressed by the government; and third, that prejudice ensued. See Strickler v. Greene, 527 U.S. 263, 282 (1999) (listing elements for a Brady violation). No such violation exists because the prosecution has not suppressed discoverable information, but rather the Government required a military judge to regulate discovery under RCM 701 and MRE 505 and to enforce reasonable protective measures before authorizing further disclosure or inspection of classified information in light of national security concerns. This is evidenced by the original Prosecution Proposed Case Calendar where the prosecution outlined for the Court and the defense how much time it anticipates is needed to review voluminous classified material and be able to present much of this material to the Court under MRE 505 in a systematic and efficient process. See Enclosure 7. The Court’s recent rulings with respect to discovery and the protective order limit foreseeable risks to national security, thus satisfying those measures necessary to obtain approval for disclosure or inspection.

II: EVEN ASSUMING, *ARGUENDO*, AN ALLEGED DISCOVERY ERROR TOOK PLACE, DISMISSAL OF ALL CHARGES WITH PREJUDICE WOULD BE AN IMPROPER AND UNJUST REMEDY.

Even assuming, *arguendo*, the Court finds error in discovery, dismissal of all charges with prejudice would be an unjust and improper result. Military courts have long held that dismissal is a drastic remedy. See United States v. Cooper, 35 M.J. 417, 422 (C.M.A. 1992) (“[E]ven where there have been allegations of flagrant and persistent prosecutorial misconduct...a[n] [appellate] court should not mandate automatic reversal without regard to the prejudicial impact of the misconduct.”). Appellate courts first determine whether alternative remedies are available, short of dismissal. See id., at 422; see also United States v. Edmond, 63 M.J. 343, 345 (C.A.A.F. 2006) (noting that appellate courts “look[] at the fairness of the trial and not the culpability of the prosecutor”). Trial courts should follow this same approach. Here, administrative procedures under the rules, to include those already adopted by the Court, will cure any alleged defect that may have possibly prejudiced the accused.

The Court has adopted one such procedure, an *in camera* review under RCM 701(g)(2), which can also act as a remedy. On 23 March 2012, the Court ordered the prosecution to produce information subject to the Motion to Compel Discovery for *in camera* review to determine what, if anything, is subject to discovery or inspection. See Enclosure 1. This review ensures all discoverable information is produced.²

Furthermore, dismissal of all charges with prejudice would be improper and unjust because the prosecution is in a position to cure any possible prejudice to the accused, particularly in light of its ongoing search for discoverable information given the volume and substance of the accused's charged misconduct. As explained above, the prosecution promptly requested all government entities whose files the prosecution is required to search under Williams to segregate and *preserve* any records related to the accused, WikiLeaks, and the evidence in this case. See Enclosure 4. Those entities continue to preserve such records.³ Ordering the prosecution to adopt alternative discovery procedures in its continuous review of these preserved records, a task the prosecution will expeditiously pursue if ordered, is another remedy available to the Court, short of dismissal.⁴

III: THERE IS NO LEGAL AUTHORITY TO SUPPORT DISMISSAL OF ALL CHARGES WITH PREJUDICE UNDER THE FACTS.

There is no legal authority to support dismissal of all charges with prejudice *before* the court-martial commences under these facts. The defense argues RCM 701(g)(3)(D) provides the Court with this implicit authority, yet provides no authority supporting its conclusion. The defense relies upon the rulings in Vigil, an Air Force Court of Criminal Appeals case, and Fletcher, a Court of Appeals for the Armed Forces (CAAF) case, to conclude that a trial court has the implicit power to dismiss charges with prejudice for alleged discovery violations during pretrial motions practice. See Vigil v. Bower, 1996 WL 233211 (A.F. Ct. Crim. App. 1996); see also United States v. Fletcher, 62 M.J. 175, 178 (C.A.A.F. 2005).

In Vigil, the appellant pled guilty to an Article 112a offense and was sentenced to a dismissal and confinement for four months. See Vigil, 1996 WL 233211. *After trial*, the defense learned of exculpatory evidence which the Government did not provide the defense. The military judge conducted a post-trial hearing wherein the military judge found that "this information, if provided to the defense, would have had a high probability of causing a different result." Id., at 1. The military judge concluded that a new trial would be "adequate to protect [the appellant's] rights," while not giving him "an unwarranted windfall." Id. The appellant

² As stated in the preceding section, the prosecution has anticipated, since before referral, presenting much of this material to the Court in a systematic and efficient process, which is what the Court has ordered, but on an accelerated timeline, based on the defense's evidentiary motions being filed prior to arraignment.

³ The purpose of this search and preserve request was two-fold; first, to ensure the prosecution complies with its obligations under Williams; and second, to ensure that no evidence is lost or destroyed.

⁴ Accomplishing this task will not take "another two years" as suggested by the defense; to the contrary, the prosecution expeditiously continues to conduct its Williams search of such voluminous information, both classified and unclassified. The prosecution has already produced in discovery a total of 44,279 documents, consisting of 417,914 pages, even though referral took place on 3 February 2012. See RCM 701(g).

filed a petition for extraordinary relief to reverse the military judge's ruling and dismiss all charges with prejudice. The Court denied this petition. See id. This case provides no precedent for dismissal of all charges. Rather, this case serves as precedent for a court to order a new trial on the merits when the defense learns of discoverable information that the Government failed to disclose to the defense. Here, those facts do not exist.

In Fletcher, the appellant was tried and sentenced to one month confinement for a violation of Article 112a. See Fletcher, 62 M.J. at 175. The CAAF found that the trial counsel engaged in prosecutorial misconduct at trial by making improper arguments and that such misconduct prejudiced the appellant. See id., at 178 ("While prosecutorial misconduct does not automatically require a new trial or the dismissal of the charges against the accused, relief will be granted if the trial counsel's misconduct 'actually impacted on a substantial right of an accused (i.e., resulted in prejudice).'" (citing United States v. Meek, 44 M.J. 1, 5 (C.A.A.F. 1996))). The CAAF reversed the findings and sentence. This case provides no precedent for dismissal of all charges *before* the court-martial commences, but rather serves as precedent when alleged prosecutorial misconduct transpired at court to the prejudice of an appellant. Here, those facts do not exist.

Dismissal of all charges with prejudice would be an unjust result because the defense has provided no factual basis to support its argument. The defense alleges that the prosecution engaged in "willful" or "grossly negligent" prosecutorial misconduct. See Enclosure 3. Prosecutorial misconduct is "action or inaction by a prosecutor in violation of some legal norm or standard, e.g., a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon." Meek, 44 M.J. at 5. The defense cites cases whereby appellate courts concluded that prosecutors wrongfully and completely withheld from the defense either exculpatory evidence, otherwise discoverable information inconsistent with its theory of the case, or other discoverable information to gain a "tactical advantage." See United States v. Charles, 40 M.J. 414 (C.M.A. 1994) (the appellate court found error where trial counsel failed to disclose impeachment information relating to key government witness); see also United States v. Koubriti, 336 F. Supp. 2d 676 (6th Cir. 2004) (discussing how federal prosecutors wrongfully failed to disclose documents "which were clearly and materially exculpatory" because such documents were inconsistent with their view of the case). The defense argues the prosecution is "deliberately withholding Brady material" without providing a factual basis.⁵ See Enclosure 3. To the contrary, the prosecution has, and will continue to, produce Brady material to the defense as soon as possible. See Enclosure 7 (the prosecution originally requested classified procedures under MRE 505 to take place in Phase I for "Immediate Action" under a systematic method to produce classified information post-referral). The prosecution has not withheld discoverable information, but rather the Government required a military judge to regulate discovery under RCM 701 and MRE 505 and to enforce reasonable protective measures, such as a protective order, before authorizing further disclosure or inspection of sensitive unclassified and classified information in light of ongoing criminal investigations and national security concerns. The Court's recent rulings with respect to discovery and the protective order limit foreseeable risks to

⁵ The only information that the prosecution has yet to disclose to the defense is classified documents for which the classified information privilege may be invoked and/or reasonable protective measures needed to be taken, or information the prosecution does not consider discoverable under any applicable statute, rule, or case, such as work product.



Appellate Exhibit 42
Enclosure 1
has been entered into the
record as
Appellate Exhibit 36

Appellate Exhibit 42
Enclosure 2
has been entered into the
record as
Appellate Exhibit 26

Appellate Exhibit 42
Enclosure 3
has been entered into the
record as
Appellate Exhibit 31

Appellate Exhibit 42
Enclosure 4
has been entered into the
record as
Appellate Exhibit 12

UNITED STATES OF AMERICA

v.

Manning, Bradley E.
PFC, U.S. Army,
HHC, U.S. Army Garrison,
Joint Base Myer-Henderson Hall
Fort Myer, Virginia 22211

Prosecution Response

to Defense Motion to Dismiss All Charges
with Prejudice

Enclosure 5

12 April 2012

TRANSMITTAL RECORD For use of this form, see AR 25-50; the proponent agency is DCS, G-1		1. SECURITY CLASS CONFIDENTIAL Classified	2. SHIPMENT NO.
3. TITLE/FILE IDENTIFICATION ManningB_00412589-00417908		4. AS OF DATE (YYYYMMDD)	5. SHIPMENT DATE (YYYYMMDD) 15 March 2012
6. AUTHORITY FOR SHIPMENT		7. NUMBER OF RECORDS TRANSMITTED 2 DVDs	
8. PERSON TO CONTACT (Name and telephone) CW2 Arthur Ford (202) 685-1975		9. REQUIREMENT CONTROL SYMBOL (AR 335-15)	
10. SHIPPED FROM Office of the Staff Judge Advocate 103 3rd Ave Bldg 32, Suite 100 Fort McNair, Washington DC 20319		11. SHIPPED TO Trial Defense Service <input checked="" type="checkbox"/> RETURN RECEIPT REQUESTED (When box is checked, sign below and return copy to sender.)	
10a. TYPED NAME AND TITLE OF SENDER <i>Fein, Arthur</i>		11a. TYPED NAME AND TITLE OF RECEIVER <i>Paul Bouchard</i>	
10b. SIGNATURE OF SENDER <i>[Signature]</i>		11b. SIGNATURE OF RECEIVER AND DATE <i>[Signature] 16 March 12</i>	
12. TYPE OF MEDIA TRANSMITTED			
<input type="checkbox"/> HARD COPY		<input type="checkbox"/> PUNCHED CARDS	
<input type="checkbox"/> MICROFILM		<input type="checkbox"/> PHOTO	
<input type="checkbox"/> CASSETTES		<input checked="" type="checkbox"/> 2 DVDs	
<input type="checkbox"/> FICHE		<input type="checkbox"/>	
13. NUMBER OF BOXES (Packages)		14. NUMBER OF ITEMS 2 DVDs	
15. METHOD OF SHIPMENT			
<input checked="" type="checkbox"/> COURIER		<input type="checkbox"/> FIRST CLASS	
<input type="checkbox"/> EXPRESS MAIL		<input type="checkbox"/> PARCEL POST	
<input type="checkbox"/> REGISTERED		<input type="checkbox"/>	
16. SPECIAL INSTRUCTIONS			
17. TYPE COMPONENT USED (For magnetically recorded data)			
18. REMARKS Material in this shipment is classified up to SECRET//NOFORN.			

Appellate Exhibit 42
Enclosure 6
has been entered into the
record as
Appellate Exhibit 12

Appellate Exhibit 42
Enclosure 7
has been entered into the
record as
Appellate Exhibit 1

IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES)

v.)

MANNING, Bradley E., PFC)

U.S. Army, xxx-xx-)

Headquarters and Headquarters Company, U.S.)

Army Garrison, Joint Base Myer-Henderson Hall,)

Fort Myer, VA 22211)

**DEFENSE REPLY
TO PROSECUTION RESPONSE
TO DEFENSE MOTION TO
DISMISS ALL CHARGES WITH
PREJUDICE**

DATED: 17 April 2012

RELIEF SOUGHT

1. In accordance with the Rules for Courts-Martial (R.C.M.) 701(g)(3)(D), the Defense moves to dismiss all charges in this case with prejudice.

BURDEN OF PERSUASION AND BURDEN OF PROOF

2. As the moving party, the Defense has the burden of persuasion. R.C.M. 905(c)(2). The burden of proof is by a preponderance of the evidence. R.C.M. 905(c)(1).

WITNESSES/EVIDENCE

3. The Defense does not request any witnesses for this motion, but respectfully requests this Court to consider the following evidence:

- a) Defense Motion to Compel Discovery – AE VIII;
- b) Prosecution Response to the Defense's Motion to Compel Discovery – AE XVI;
- c) Defense Reply to the Prosecution Response to the Defense's Motion to Compel Discovery – AE XXVI;
- d) Defense Motion to Dismiss All Charges With Prejudice – AE XXXI;
- e) Prosecution Response to Defense Motion to Dismiss All Charges With Prejudice;
- f) Email from then-CPT Fein¹ to the Court and Defense regarding classified discovery (22 March 2012) – Email Appendix;
- g) Email from MAJ Fein to Defense regarding the 14 hard drives at issue in discovery (16 April 2012) – Email Appendix;
- h) Audio Recording of Motions Argument (15 March 2012) ["Oral Argument"];

¹ For ease of reference, all subsequent references to this email will be to "CPT Fein."

- i) Enclosure to Prosecution Supplement to Prosecution Proposed Case Calendar – AE XII.

ARGUMENT

4. As the Army Court of Criminal Appeals has recently said, “[i]gnorance or misunderstanding of basic, longstanding ... fundamental, constitutionally-based discovery and disclosure rules by counsel undermines the adversarial process and is inexcusable in the military justice system.” *United States v. Dobson*, 2010 WL 3528822, at *7 (A. Ct. Crim. App. Aug. 9, 2010). In this case, the Government has wholly misunderstood those longstanding, fundamental and constitutionally-based rules, resulting in irreparable prejudice to PFC Manning.

5. In this Court’s Ruling dated 23 March 2012, the Court made, *inter alia*, the following findings of law:

- a) *Brady* requires the Government to disclose evidence that is favorable to the defense and material to guilt or punishment. Ruling: Defense Motion to Compel Discovery, p. 7, para. 2. [hereinafter “Ruling”].
- b) RCM 701(a)(6)(Evidence favorable to the defense) codifies *Brady* and provides that the trial counsel shall, as soon as practicable, disclose to the defense the existence of evidence known to the trial counsel which reasonably tends to: (A) negate the guilt of the accused to an offense charged; (B) reduce the degree of guilt of the accused of an offense charged; or (C) reduce the punishment. Ruling, p. 8-9, para. 6.
- c) *Brady* applies to classified information. Ruling, p. 7-8, para. 2.
- d) Where the Government seeks to use MRE 505 to withhold classified information, a privilege must be claimed in accordance with MRE 505(c). Ruling, p. 7, para. 1.
- e) The classification information privilege under MRE 505 does not negate the Government’s duty to disclose information favorable to the defense and material to punishment under *Brady*. Ruling, p. 7-8, para. 2.
- f) The requirements for discovery and production of evidence are the same for classified and unclassified information under RCM 701 and 703 unless the Government moves for limited disclosure under MRE 505(g)(2) or claims the MRE 505 privilege for classified information. Ruling, p. 8, para. 5.
- g) RCM 701(f) applies to discovery of classified information only when the Government moves for limited disclosure under MRE 505(g)(2) of classified information subject to discovery under RCM 701 or when the government claims a privilege under MRE 505(c) for classified information. Ruling, p. 9, para. 6.c.

- h) If classified discovery is at issue and the government does not wish to disclose the classified information in part or in whole to the defense, the government must claim a privilege under MRE 505(c). Ruling, p. 10, para. 11.

6. Based on the Court's findings of law and the Government's written and oral submissions, it is clear that the Government did not understand the relevant *Brady* standard; did not understand its obligations under R.C.M. 701(a)(2); and did not understand the process of classified discovery.

7. The Government contends that "[d]ismissal of all charges with prejudice would be an unjust remedy because the defense has provided no factual basis to support its argument." Prosecution Response to Defense Motion to Dismiss All Charges With Prejudice, p. 6. The Defense believes that it very clearly laid out the discovery violations in its Motion to Dismiss All Charges With Prejudice. However, the Defense will provide a further factual basis for its Motion herein.

8. Moreover, the Defense would note that the Government has not even made an attempt to rebut the Defense's argument that it committed a discovery violation. The only proffer that the Government makes in its "defense" is the following:

The prosecution has, and will continue to, mirror the open file discovery system as much as practicable, taking into consideration the national security concerns relating to that which may be discoverable. [legal citations omitted]. To date, the prosecution has produced 2,729 unclassified documents, totaling 81,273 pages, and 41,550 classified documents, totaling 336,641 pages. Much of the information, discoverable or not, is owned by other government agencies and may contain multiple equity holders, requiring interagency coordination. The prosecution will continue to coordinate expeditiously with those entities to ensure the accused receives a speedy and fair trial.

The defense alleges that the prosecution has committed discovery violations, to include a violation of *Brady* and RCM 701(a)(2). The three components of a discovery violation are as follows: first, that the evidence is discoverable; second, that the evidence was suppressed by the government; and third, that prejudice ensued. See *Strickler v. Greene*, 527 U.S. 263, 282 (1999) (listing elements for a *Brady* violation). No such violation exists because the prosecution has not suppressed discoverable information, but rather the Government required a military judge to regulate discovery under RCM 701 and MRE 505 and to enforce reasonable protective measures before authorizing further disclosure or inspection of classified information in light of national security concerns. This is evidenced by the original Prosecution Proposed Case Calendar where the prosecution outlined for the Court and the defense how much time it anticipates is needed to review voluminous classified material and be able to present much of this material to the Court under MRE 505 in a systematic and efficient process. The Court's recent rulings with respect to discovery and the protective order limit foreseeable risks to national security, thus satisfying those measures necessary to obtain approval for disclosure or inspection.

Prosecution Response to Defense Motion to Dismiss All Charges With Prejudice, p. 4 (citations omitted). When this is boiled down, it amounts to the following argument:

- a) The Government already given the Defense a lot of discovery;
- b) Discovery is complicated and requires much inter-agency co-ordination;

- c) The Government did not outright suppress relevant evidence;
- d) The Government was simply waiting for a military judge to help regulate discovery.

9. None of this, even if true,² provides any rebuttal to the specific issues raised in the Defense's Motion to Dismiss All Charges With Prejudice. How can the Government now say it understood that R.C.M. 701(a)(6) applies in light of its previous position that federal appellate *Brady* applied? How can the Government say that it understood that *Brady* mandates the disclosure of evidence that is favorable for sentencing when: a) it believed *Brady* to be concerned with "findings of guilt"; and b) it refused to turn over damage assessments because they did not contain material that was favorable for the merits? How can the Government say that it understood classified discovery when its position was that R.C.M. 701 does not apply in classified evidence cases?

10. These are but a few of the questions that the Government should have attempted to answer. Its lack of an answer to them speaks volumes and can be construed as nothing short of an admission that the Government has full knowledge that it committed very serious discovery violations.

11. The Defense will address the relevant issue as follows. First, it will explain in detail why it is clear that the Government did not understand *Brady*, R.C.M. 701(a)(2), or classified discovery. Next, it will highlight the Government's convenient *ex post* revisionism of the facts. Finally, it will explain why the Government's discovery violations warrant dismissal of all charges with prejudice.

A) The Government Engaged in Grossly Negligent or Willful Discovery Violations

i) The Government Did Not Understand the Relevant Brady Standard

12. The Government's written submissions, oral submissions, and conduct illustrate that it did not understand its *Brady* obligations. It is clear from the Government's statement of law in the Prosecution Response to Defense Motion to Compel Discovery that it does not understand what *Brady* mandates under military law.

- The Government does not cite once to R.C.M. 701(a)(6), the military's version of *Brady*, in its 15-page response to the Defense's motion to Compel Discovery.
- The Government believes that its *Brady* obligations are governed by the federal appellate standard. It states the relevant standard as follows:

² The Defense would contest the accuracy of c) and d), as outlined in more detail herein. The Government cites *Strickler v. Greene*, 527 U.S. 263, 282 (1999) for the elements of a *Brady* violation: "first, that the evidence is discoverable; second, that the evidence was suppressed by the government; and third, that prejudice ensued." Prosecution Response to Defense Motion to Dismiss All Charges With Prejudice, p. 4. The government implies that the "suppression" must be deliberate (i.e. the government actively concealed the information). However, *Stickler*, says no such thing; instead, the Supreme Court in *Strickler* states that "that evidence must have been suppressed by the State, either willfully or inadvertently." See 527 U.S. at 282. Moreover, the Government is again confusing pre-trial/trial issues with appellate issues. *Strickler* deals with the standard of review for *Brady* violations that are discovered post-trial.

“Favorable evidence ‘is subject to constitutionally mandated disclosure when it ‘could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.’” (citing *Cone v. Bell*, 556 U.S. 449, 464 (2009)). Evidence is ‘material’ within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would be different.” *Id.* at 469.

This is obviously not the correct standard. Under this standard, evidence would only be subject to disclosure under *Brady* if it would be an absolute “game-changer.” In *United States v. Safavian*, 233 F.R.D. 12, 13-14 (D.D.C. 2005), the court indicated why the appellate standard was not (and could not be) the appropriate *Brady* standard for prosecutors to use:

The government acknowledges that under *Brady* it has the affirmative duty to produce exculpatory evidence when such evidence is material to either guilt or punishment. But it contends that evidence is “material” only “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *The problem with this iteration of Brady and the government’s view of its obligations at this stage of the proceedings, however, is that it permits prosecutors to withhold admittedly favorable evidence whenever the prosecutors, in their wisdom, conclude that it would not make a difference to the outcome of the trial.* Most prosecutors are neither neutral (nor should they be) nor prescient, and any such judgment necessarily is speculative on so many matters that simply are unknown and unknowable before trial begins: which government witnesses will be available for trial, how they will testify and be evaluated by the jury, which objections to testimony and evidence the trial judge will sustain and which he will overrule, what the nature of the defense will be, what witnesses and evidence will support that defense, what instructions the Court ultimately will give, what questions the jury may pose during deliberations (and how they may be answered), and whether the jury finds guilt on all counts or only on some (and which ones).

The prosecutor cannot be permitted to look at the case pretrial through the end of the telescope an appellate court would use post-trial. Thus, the government must always produce any potentially exculpatory or otherwise favorable evidence without regard to how the withholding of such evidence might be viewed—with the benefit of hindsight—as affecting the outcome of the trial. The question before trial is not whether the government thinks that disclosure of the information or evidence it is considering withholding might change the outcome of the trial going forward, but whether the evidence is favorable and therefore must be disclosed. Because the definition of “materiality” discussed in *Strickler* and other appellate cases is a standard articulated in the post-conviction context for appellate review, it is not the appropriate one for prosecutors to apply during the pretrial discovery phase. The only question before (and even during) trial is whether the evidence at issue may be “favorable to the accused”; if so, it must be disclosed without regard to whether the failure to disclose it likely would affect the outcome of the upcoming trial. (emphasis added)

- The Government does not believe that favorable evidence for sentencing is *Brady* material. It cites cases for the proposition that: a) “[e]vidence that is material to guilt will often be material for sentencing purposes as well; the converse is not always true” and; b) “the proper standard of materiality must reflect our overriding concern with the justice of the *finding of guilt*.” Prosecution Response to Defense Motion to Compel Discovery, p. 6 (emphasis added by Government). The citations clearly show that the Government believes that favorable evidence for sentencing is not subject to disclosure under *Brady*.

13. After oral argument, on 21 March 2012, the Court asked the Government to respond, *inter alia*, to the following question: Is there any favorable material [in the damage assessments the Government has reviewed?]. The Government’s response with respect to the DIA and IRTF reviews was that there was favorable material.³ It stated that it found information that is favorable to the accused that is material to punishment. It further stated that it had not found any favorable material relevant to findings. The concession that the damage assessment is “favorable” is wholly at odds with the Government’s statement two weeks earlier in its Response to Defense Motion to Compel Discovery, where it flat-out stated, “[t]he alleged damage assessment by the IRTF is not ‘relevant and necessary.’” *Id.*, p. 10.

14. In its findings the Court stated that the “IRTF damage assessment is relevant and necessary for discovery under *Brady* and RCM 701(a)(6).” Ruling, p. 11. The fact that the Government did not view as *relevant* that which it conceded was *favorable* to the accused plainly illustrates that it does not understand the *Brady* standard for discovery.

15. In oral argument, the Government further proved that it did not understand the *Brady* standard. CPT Fein was asked by the Court to articulate what he believed *Brady* entailed. CPT Fein hesitated and could not answer the question without looking down at his notes. He stated:

Ma’am – I don’t even want to cite it incorrectly. Ma’am we are required through *Brady* and its progeny to do a due diligence search in order to find exculpatory ... one moment please ma’am [pause] ... to search for any information that is material to either guilt or to punishment irrespective of the good or the bad faith of the prosecution in turning over that material.

Oral Argument, 15 March 2012, at 1:03:19. The latter part of trial counsel’s statement makes absolutely no sense and has nothing to do with the standard for disclosure under *Brady*.

³ At oral argument, CPT stated that he could not disclose whether these damage assessments contained favorable information because that fact was classified.

Court: None of the damage assessments are *Brady* material?

CPT Fein: Ma’am I do not have authority to answer that question.

Court: Why not?

CPT Fein: Because it’s classified information.

Oral Argument, 15 March 2012, at 1:10:30. Apparently, five days later, that fact (whether the damage assessments contained favorable information) was no longer classified as the Government was able to send the requested information via a non-secure email. The Defense believes that whether the damage assessments contained *Brady* material was never classified information and thus, the Government misrepresented this fact to the Court.

16. While the Defense appreciates that oral argument can be intense and stress-inducing, the Court asked a very basic question that the Government should have been able to respond to without consulting pre-written notes. The fact that the Government claims it fully understands its *Brady* obligations, but cannot articulate what those obligations are without a cheat-sheet, shows that the Government does not actually understand its *Brady* obligations. Moreover, even with the cheat-sheet, the Government still could not pin down the *Brady* standard, saying that *Brady* requires the government “to search for any information that is material to either guilt or to punishment irrespective of the good or the bad faith of the prosecution in turning over that material.” Oral Argument, 15 March 2012, at 1:03:19.

17. After the Court’s ruling on 23 March 2012, the Government went to great pains in its subsequent emails with the Court and the Defense to clarify that it understood its *Brady* obligations. Unfortunately for the Government, the proof is in the pudding. The Government’s 15-page Response to Defense Motion to Compel Discovery, its statements at the oral argument, and its refusal to see the damage assessments as *Brady* material lead to one absolutely inescapable conclusion: that the Government did not understand *Brady*.

ii) The Government Did Not Understand its General Discovery Obligations Under R.C.M. 701

18. In addition, the Government did not understand discovery under R.C.M. 701(a)(2). Not once is R.C.M. 701(a)(2) cited in the Government’s Response to the Defense Motion to Compel Discovery. Instead, the Government cited to R.C.M. 703, the rules governing production of evidence, to deny the discovery requested by the Defense. The reference to R.C.M. 703 was not an accident; the Government cited to R.C.M. 703 thirty-five times in its motion. It believed that it was only obligated to turn over specifically-requested items where the Defense could prove, to the Government’s satisfaction, that the items were “relevant and necessary” to an element of the charged offense. This is a much higher threshold than that which is actually mandated by R.C.M. 701(a)(2). The Government’s failure to understand the correct standard under R.C.M. 701(a)(2) (or, more accurately, its failure to understand that R.C.M. 701(a)(2) governed disclosure of items within its possession, custody or control) meant that the Defense was not provided with the needed-discovery.

19. Further, the Government maintained that it was “unaware” of the existence of any forensic results or investigative files relevant to the case maintained by DOS, FBI, DIA, ONCIX and CIA. The Court ruled that “[t]hese agencies are closely aligned with the Government in this case. The Government has a due diligence duty to determine whether such forensic results or investigative files that are germane to this case are maintained by these agencies.” Ruling, p. 11. This clearly shows that the Government did not understand its obligations of due diligence in respect of the requested-discovery.

iii) The Government Did Not Understand How Classified Discovery Works

20. This case is an important classified evidence case. And the Government has outright admitted that it does not know how classified discovery works. The Defense has consistently maintained that R.C.M. 701 governs discovery, both classified and unclassified. While R.C.M. 701(f) provides that nothing in the section shall require the disclosure of classified discovery, this does not mean that R.C.M. 701 does not apply to classified discovery. The Government in

its Response to the Defense Motion to Compel Discovery alluded to the fact that R.C.M. 701 does not control classified discovery when it stated, "The rule does not govern the production of classified information. See R.C.M. 701(f) ("nothing in this rule shall...require the disclosure of information protected from disclosure by [MRE 505]").

21. In oral argument, CPT Fein stated that R.C.M. 701(a)(6)/*Brady* does not apply to classified information: "[b]ut 701(a)(6) does not apply to classified information, which is what I started with. The United States has complied with its obligations under 701. The one big elephant in the room unfortunately is that everything the defense is requesting that we have not produced in discovery is classified information." Oral Argument, 15 March 2012, at 1:04.

22. On 22 March, 2012, CPT Fein sent an email to the parties where he stated, in no uncertain terms, the Government's position that R.C.M. 701 does not apply to classified discovery:

As litigated at the motions hearing, the government's position is that classified information does not fall under RCM 701. The information the defense has requested in discovery is classified and the prosecution has no reason to believe it is not classified. Because the information is classified, RCM 701 does not apply (as per RCM 701(a) and (f)), which leaves the prosecution to use the standards under MRE 505 along with Brady and its progeny. The defense provided no authority to apply RCM 701(a)(2) or (6) to classified information and all the authorities only reference unclassified information. The prosecution has relied on MRE 505 and Brady for regulation of what classified information is discoverable.

The United States Government must always weigh the necessity to provide the defense access to classified information and protecting national security. The normal open-file procedures in the military justice process does not and cannot apply to classified information, although in this case the government has turned over as much classified information as possible while still protecting national security. The parties are now at a point where the defense wants access to classified information that the government does not agree to disclose under MRE 505(g)(1). To date, the only classified information the defense has requested which the government has withheld are items subject to the motion to compel, because they are more sensitive than the other classified information previously produced. The prosecution has maintained from the beginning of this case, that it intends to produce all discoverable information, under our legal and ethical obligations.

Just because the defense requests classified information does not mean it is discoverable, as outlined in MRE 505 and relevant case law. The United States understands its Constitutional obligations to ensure a fair trial while balancing national security interests by protecting classified information.

Email from CPT Fein, 22 March 2012.

23. This email shows just how off-base the Government is on its discovery obligations and on trying a classified evidence case generally. Its position is that because the information is classified, R.C.M. 701 does not apply, leaving the Government to use the standards set forth

under M.R.E. 505 and federal *Brady*. The Government then assumed the job of being the arbiter of what is discoverable, by balancing the rights of the accused with the interests of the United States government in protecting national security. In short, the Government has usurped the role of the military judge by becoming the sole authority of when national security concerns should yield to the rights of the accused, and vice versa. It is startling to believe that the Government would consider it appropriate for a prosecutor to balance national security with the rights of the party who it is prosecuting. The Government failed to realize that such balancing, to the extent it must be done, is fully within the purview of the military judge. And, it is only appropriate *after* the Government has engaged the processes of M.R.E. 505.

24. The Government, in its motion, email, and in oral argument repeated that M.R.E. 505 governs production of classified information. But this is only half-true. M.R.E. 505 does not apply unless the Government claims a privilege. As the Court stated in its Ruling, “[i]f classified information detrimental to national security is at issue and the government does not wish to disclose the classified information in part or in whole to the defense, the government must claim a privilege under MRE 505(c).” Ruling, p. 10. The Court has found that in this case “[n]o government entity in possession of any discovery at issue has claimed a privilege under MRE 505(c).” *Id.* The Government, in addition to not understanding that classified evidence is subject to disclosure under R.C.M. 701, failed to understand the appropriate process for not disclosing relevant discovery under M.R.E. 505.

25. In short, the Government: a) thought that R.C.M. 701 does not govern classified discovery (whereas the Court found that it did); b) thought that the Government, and not the judge, should engage in a balancing test of the rights of the accused and the interests of national security; and c) failed to follow the appropriate process for claiming a privilege under M.R.E. 505, all while withholding discovery from the Defense.

26. This case shows a cataclysmic failing of the Government to understand all aspects of the discovery process. As the Defense indicted in its Motion to Dismiss All Charges With Prejudice, it is not clear whether the Government’s position on discovery amounted to gross negligence or willful misconduct.

27. The Defense believes, however, that there is ample evidence to support the contention that the discovery violations are willful, as the Government seems to be resisting handing over exculpatory evidence at every turn. Among the factors suggesting that the discovery violations are willful:

- The Government’s refusal, up until very recently, to acknowledge that at least some of the damage assessments are *Brady* material. In oral argument, the following exchange occurred:

Court: None of the damage assessments are *Brady* material?

CPT Fein: Ma’am I do not have authority to answer that question.

Court: Why not?

CPT Fein: Because its classified information.

Oral Argument, 15 March 2012, at 1:10:30. The Government's failure to acknowledge whether the damage assessments are *Brady* material deliberately makes it difficult for the Defense to compel such discovery as being *Brady* material and to hold the Government accountable for its discovery violations.

- The Government's practice of referring to the damage assessments as "alleged" in order to make it difficult for the Defense to compel discovery of something that is not even confirmed to exist.
- The Government's misleading use of the phrase, "[X entity] has not completed a damage assessment" when it should have said, "[X entity] has not finished completing its damage assessment." The former implies that such a damage assessment was never even performed, leading one to believe that the Defense's request is moot.
- The Government maintaining that it is "unaware" of forensic results from various organizations, without stating it looked for those results. Normally, when a party states that it is "unaware" of certain results, this implies that it undertook to search for those results on good faith basis.
- The Government claiming that it does not know what discovery the Defense is seeking and asking the Defense to make the request with more specificity; all while claiming that the information is not "relevant and necessary." As previously pointed out, these two things are inconsistent.
- The Government claiming, during a telephonic 802 session, that work product is not exempt under *Brady*, but then stating that because the State Department has not "completed" a damage assessment, such an assessment is not subject to disclosure. Again, the two are inconsistent. As a result of the Government's inconsistent positions on this issue, this Court ordered the Government to produce a witness from the State Department to appear at the oral motions argument to confirm what information is or is not available within that agency.
- The Government deliberately misunderstanding the Defense's position regarding the potential evidence to be obtained from a search of the 14 hard drives, and then resisting performing simple computer searches that it has a good faith basis to believe will yield favorable evidence for the accused.

28. This behavior by the Government would seem to suggest that the wholesale discovery violations are part of a deliberate pattern to deny discovery to the Defense. *United States v. Hsia*, 24 F. Supp. 2d 14, 30 (D.D.C. 1998) ("[C]ourts in this jurisdiction look with disfavor on narrow readings of the government's *Brady* obligations; it simply is insufficient for the government to offer "niggling excuses" for its failure to provide potentially exculpatory evidence to the defendant, and it does so at its peril.").

29. Whether such discovery violations are willful or grossly negligent is of no particular import, as both are inexcusable. See *United States v. Dobson*, 2010 WL 3528822, at *7 (A. Ct. Crim.

App. Aug. 9, 2010) (“While we defer to the military judge’s evaluation of the witnesses’ credibility and his finding that the government’s violation of discovery rules was not deliberate, but rather ignorant, neither is tolerable. Hiding the ball and ‘gamesmanship’ have no place in our open system of discovery.”) (citing *United States v. Adens*, 56 M.J. 724, 731 (C.A.A.F. 2002) (broad discovery at an early stage reduces pretrial motions, surprise, and trial delays ... leads to better informed judgments about the merits of the cases and encourages broad early decisions concerning withdrawal of the case, motions, pleas, and composition of the court-martial—in short its practice “is essential to the administration of justice”); *United States v. Dancy*, 38 M.J. 1, 5 n.3 (C.M.A.1993) (explaining the “unfortunate consequences of a trial counsel’s disregard for the discovery rights of an accused”)); see also *Breakiron v. Horn*, 642 F.3d 126, 133 n.8 (3rd Cir. 2011) (“In this regard the prosecutor has much to answer for. When asked at oral argument why the prosecutor did not disclose this material, the Commonwealth conceded that it ‘seems a little strange.’ The Commonwealth also conceded that such material would have been disclosed ‘under the modern rules of discovery.’ That response is at once true and insufficient. It was so well-established before [defendant’s] trial as to have been axiomatic that prosecutors must disclose impeachment evidence like that at issue here. The Commonwealth has not otherwise attempted to explain why this material was not disclosed or to defend the prosecutor’s failure to disclose it. Like the District Court, we are troubled by that failure. We are at a loss to understand why prosecutors, so long after *Brady* became law, still play games with justice and commit constitutional violations by secreting and/or withholding exculpatory evidence from the defense.”).

B. The Government Is Now Engaged In *Ex Post* Revisionism

30. The Government has now engaged in deliberate *ex post* revisionism by pretending that they did not say what they clearly said and did not do what they clearly did. Unfortunately for the Government, its responses and representations were in writing, in open court, or in sessions with the Military Judge. The Government cannot now sweep this under the rug by make-believing that these discovery violations did not happen.

31. It is telling that among the evidence that it would have the Court consider, it does not list its own Response to the Defense Motion to Compel or its own email regarding classified discovery. This is the best evidence of the standard the Government was operating under until it was corrected by the Military Judge.

32. The following plainly illustrates the Government’s *ex post* revisionism:

- a) In its latest Response, the Government “largely agrees with the defense’s recitation of the discovery rules in its Reply.” Prosecution Response to Defense Motion to Dismiss All Charges With Prejudice, p. 3. This is inconsistent with its actual Response to the Defense Motion to Compel Discovery which cites almost exclusively to R.C.M. 703. It does not reference 701(a)(2) or 701(a)(6) even once.
- b) In its latest Response, the Government states, “The prosecution shall disclose evidence that is favorable to the accused and material to either guilt or punishment.” Prosecution Response to Defense Motion to Dismiss All Charges With Prejudice, p.

3. In its early Response to the Defense Motion to Compel Discovery, it cited a case which stated that the relevant standard “must reflect our overriding concern with the justice of the *finding of guilt*.” Prosecution Response to Defense Motion to Compel Discovery, p. 6. Accordingly, it did not provide the Defense with *Brady* material from any damage assessment because such material was favorable only with respect to punishment, but not the merits. See, e.g. Prosecution Response to Defense Motion to Compel Discovery at p. 10 (“Actual damage, if any, is not relevant to any element of the charged offenses.”).

- c) In its latest Response, the Government states that “the prosecution shall *always* provide *Brady* material.” Prosecution Response to Defense Motion to Dismiss All Charges With Prejudice, p. 6 (emphasis by Government). This is wholly inconsistent with its earlier position that classified information is not subject to the military *Brady* standard, R.C.M. 701(a)(6). See e.g. Oral Argument, 15 March 2012, at 1:04 (trial counsel stating “But 701(a)(6) does not apply to classified information, which is what I started with.”).
- d) In its latest Response, the Government states, “The prosecution has, and will continue to, mirror the open file discovery system as much as practicable, taking into consideration the national security concerns relating to that which may be discoverable.” Prosecution Response to Defense Motion to Dismiss All Charges With Prejudice, p. 4. This is a far cry from its position a couple of weeks ago that “[t]he normal open-file procedures in the military justice process does not and cannot apply to classified information.” Email from CPT Fein, 22 March 2012.
- e) In its latest Response, the Government repeatedly states that “no [discovery] violation exists because the prosecution has not suppressed discoverable information, but rather the Government required a military judge to regulate discovery under RCM 701 and MRE 505 and to enforce reasonable protective measures ... [for] classified information.” Prosecution Response to Defense Motion to Dismiss All Charges With Prejudice, p. 4, 6. This is plainly not true. The Government did not engage the assistance of the military judge “to regulate discovery.” Rather, *the Defense* engaged the assistance of the military judge after the Government refused to turn over the requested discovery on an improper basis. If the Government had sought the assistance of the military judge, it would have, for instance, sought *in camera* review of the requested matter or claimed a privilege under M.R.E. 505.⁴ It did neither in this case. Moreover, how can the Government say that it “required a judge to regulate [classified] discovery under R.C.M. 701” when it outright stated “because the information is classified, RCM 701 does not apply?” Email from CPT Fein, 22 March 2012. The Government cannot be permitted to say that it was waiting for a judge to regulate discovery under R.C.M. 701 when it did not believe that R.C.M. 701 was the governing standard for classified discovery.

⁴ If the Government were simply waiting for a judge to regulate discovery, it would be in a position at the time of referral to claim a privilege. The case was referred to a general court martial on 3 February 2012 and the Government now has until 18 May 2012 to assert a privilege. The proceedings have thus been delayed almost four months waiting for equity-holders to assert a privilege.

- f) In its Response, the Government refutes the Defense's argument that it used the wrong standard by stating, "[t]o the contrary, as stated on the record and as provided above, the prosecution continues its search for discoverable information under *Williams* and will produce that which the rules of discovery under RCM 701 or the Court require." Prosecution Response to Defense Motion to Dismiss All Charges With Prejudice, p. 7. The Government's phraseology here is suspect. It appears to be stating that it has always used the relevant R.C.M. 701(a)(6)/*Brady* standard ("continues its search ... under *Williams*"). However, the Government could not in good faith make that contention because it is clear from its original Response motion that it did not realize that R.C.M. 701(a)(2) and R.C.M. 701(a)(6) were the relevant standards. See discussion above. So, the Government uses deliberately ambiguous wording to suggest that it has always operated under the correct discovery standard—which it has not.

33. This Court cannot accept the Government's ritual incantations that it understands its *Brady* and other discovery obligations. See *United States v. Cerna*, 633 F. Supp. 2d 1053, 1056 (N.D. Cal. 2009) (noting that "the government is fond of saying that it knows its *Brady* obligations and will honor them"); *United States v. Hsia*, 24 F. Supp. 2d 14, 29 (D.D.C. 1998) ("While the government has represented that it 'understands its *Brady* obligations and it fully intends to abide by them,' the Court shares defense counsel's skepticism."); *United States v. Naegele*, 468 F. Supp. 2d 150, 152 n.2 (D.D.C. 2007) ("[N]ow that the Court realizes that its view of *Brady* and the government's have not been consistent for many years, it no longer accepts conclusory assertions by the Department of Justice that it 'understands' its *Brady* obligations and 'will comply' or 'has complied' with them."); *United States v. Lim*, 2000 WL 782964, at *3 (N.D. Ill. June 15, 2000) ("The government's response—which is and has been its stock response to such motions as long as the Court can recall—is that the government 'recognizes its obligation' to produce material pursuant to *Brady* and *Giglio*, that 'the government will abide by the law,' and that the motion should therefore be denied as 'moot.' ... [T]his Court does not believe that this is an appropriate way to deal with a matter as important as the government's obligation to produce material that is favorable to an accused."). Here, there is overwhelming evidence that proves that the Government did not understand its obligations; accordingly, the Government's repeated representations that it understands its discovery obligations ring hollow.

C. Dismissal of All Charges With Prejudice is the Only Appropriate Remedy

34. The Government argues that even if it committed discovery violations, dismissal of all charges would be an unjust and improper result. The Defense submits that continuing to prosecute an irreparably flawed case would be a more unjust and improper result.

35. The Government states that there are procedures to remedy any discovery violations. In particular, it states that an *in camera* review is one such procedure that can act as a remedy. According to the Government, "this review ensures all discoverable information is produced." Prosecution Response to Defense Motion to Dismiss All Charges With Prejudice, p. 5. The Government does not explain *how* an *in camera* review will "ensure[] that all discoverable information is produced." *Id.* All it ensures is that particular evidence *known* to the Defense will

be produced. It does not in any way ensure that all *Brady* evidence is produced.⁵

36. Further, the Government states that the “prosecution is in a position to cure any possible prejudice to the accused, particularly in light of its ongoing search for discoverable information given the volume and substance of the accused’s charged misconduct.”⁶ Prosecution Response to Motion to Dismiss All Charges With Prejudice, p. 5. The Government further states:

The prosecution promptly requested all government entities whose files the prosecution is required to search under Williams to segregate and *preserve* any records related to the accused, WikiLeaks, and the evidence in this case. Those entities continue to preserve such records. Ordering the prosecution to adopt alternative discovery procedures in its continuous review of these preserved records, a task the prosecution will expeditiously pursue if ordered, is another remedy available to the Court, short of dismissal.

Id. (emphasis in original). It appears that the Government is saying that *from now on*, it will use the appropriate discovery standards in reviewing potentially discoverable material. How does this remedy the prejudice that the Government has caused by failing to review the material under the correct standard for the past two years?

37. As the Government notes, there is potentially discoverable information in a myriad of aligned and non-aligned agencies. According to the Government: “[i]n total, the prosecution requested thirteen departments, agencies, and military commands to segregate and preserve such records. Furthermore, the prosecution requested specific information that is potentially discoverable from more than fifty additional departments and agencies.” Prosecution Response to Motion to Dismiss All Charges With Prejudice, p. 2.

38. The problem (which the Government refuses to even acknowledge) is that the Government has been conducting a *Brady* search using an improper standard—i.e. a standard much higher than that actually mandated by R.C.M. 701(a)(6). The Government was looking for evidence that was exculpatory on the merits; it was not looking for evidence that was “favorable to the accused” in that it reasonably tended to reduce punishment. See R.C.M. 701(a)(6). Indeed, the Government did not think that *Brady* covered information that was material to punishment. It stands to reason that there is *Brady* material (properly understood) that has been “overlooked” by the Government in its two year search.

39. The Government seems to think that the volume of provided-discovery somehow cures its failure to perform an appropriate *Brady* search. At one point, the Government says “[t]o date, the prosecution has produced 2,729 unclassified documents, totaling 81,273 pages, and 41,550 classified documents, totaling 336,641 pages.” *Id.* at 2. Discovery obligations are not measured by volume. In other words, providing a large volume of discovery does not relieve the

⁵ In fact, the Government just disclosed twelve pages of unclassified *Brady* materials to the Defense, all of which are dated as of November 2010. How is the Defense in a position to know how much other *Brady* material (unclassified or classified) the Government has been withholding?

⁶ The Defense is not clear what the latter part of this sentence means (“given the volume and substance of the accused’s charged misconduct.”).

Government from providing all discovery which it is obligated to provide under *Brady*. If the Government produced 1,000,000 classified documents, spanning 100,000,000 pages, but no *Brady* material (when such material existed), this would still be a discovery violation. The Government's numbers here are a red-herring designed to detract attention from the fact that it has not complied with R.C.M. 701(a)(2) and R.C.M. 701(a)(6) and that it has not understood classified discovery.

40. The accused is denied a fair trial when he is not provided with constitutionally-required discovery. This cannot be cured by burying the accused in a sea of other discovery. Surely our military justice system cannot countenance a scenario where the accused is denied *Brady* material, but in its stead is provided with multiple and voluminous copies of Army Regulations, and other irrelevant (or marginally relevant) materials.

41. The only way to adequately cure the prejudice that the Government has caused is to require the Government to start anew, this time using the correct standard. Now when the Government reads all the documentation from the sixty-three agencies it has contacted, it can apply the appropriate standard and provide the accused with evidence which "reasonably tends to" negate guilt or reduce guilt or punishment. Any other order would punish the accused for the Government's discovery violations, while rewarding the Government for its conduct. If the Government is not ordered to conduct a "re-review" of evidence using the correct standard, the Government actually would fare better by using the incorrect standard of *Brady* review than it would by following the law. This would be an absurd result.

42. However, while in theory the appropriate remedy is that the Government is ordered to go back and "re-review" all the evidence in light of the correct standard, this will not work in practice. There are several reasons why this is not a viable option. First, the process of "re-review" will take a year or two. If the Government is still in the process of reviewing the documents for the very first time, why would a "re-review" of the documents take any shorter period of time? This would certainly run afoul of constitutional protections afforded with respect to speedy trial. Second, to the extent that the Government suggests that a "re-review" would not take two years, this is only because the Government would have every incentive to expedite the review to avoid the speedy trial clock. If a "re-review" of all documents from sixty-three different agencies can be done in a matter of months, one might wonder: *Why did it take so long the first time? How carefully is the Government really reviewing this documentation?* Third, the Government facing an inherent conflict of interest in any potential "re-review" for *Brady* material. If the Government were to find any *Brady* material that it missed the first time due to applying the wrong *Brady* standard, this would validate the Defense's concerns about the discovery violations. As such, the Government would have every incentive not to locate *Brady* material because that would prove that the Defense was correct about the *Brady* violations to begin with.

43. Moreover, as explained in more detail in the Defense Motion to Dismiss All Charges With Prejudice, *Brady* evidence may be lost or missing. The Government states that the Government has "promptly requested all government entities whose files the prosecution is required to search [for *Brady* material] to segregate and *preserve* any records related to the accused." Prosecution Response to Motion to Dismiss All Charges With Prejudice, p. 5. It stated that the purpose of

this request was to “ensure that no evidence is lost or destroyed.” *Id.* at p. 5, n.3. The Defense does not believe that the filing of preservation requests means that the relevant information will actually be preserved. Nowhere is this more apparent than with the fourteen hard drives from PFC Manning’s SCIF. The CID requested that the evidence be preserved in September 2010; the Defense also filed a preservation request in September 2011. The Defense has recently learned that that Government believes that most or all of the drives are not operational or have been wiped clean. In a recent email, the Government wrote:

After consultation with the government forensic experts, it appears that out of the 14 hard drives that were identified to be present in the TOC or SCIF, 2 drives are completely inoperable, 7 drives are wiped, 4 drives have file structures present, and 1 drive is partially wiped. In total, only 5 drives have any information that could answer your request and ultimately the Court’s order, dated 23 March 2012.

Email from MAJ Fein, 16 April 2012. Thus, the Government’s assurances that it has segregated and preserved any records related to the accused should be viewed with skepticism.

44. Furthermore, we are two years into this case and the Defense has only just received a first glance at approximately twelve pages of *Brady* materials. All of these *Brady* materials are dated as of November 2010. Why is the Defense receiving these in April 2012, a year and five months after they were prepared? More *Brady* and other discoverable material may trickle in over the next few months. How can the Defense plan trial strategy, follow-up on investigative leads, and prepare for trial when it is still waiting for critical discovery? Our system was designed to provide discovery as soon as practicable; it does not envision withholding *Brady* and other specifically-requested discovery materials (e.g. grand jury testimony, investigative reports, etc.) and delivering them virtually on the eve of trial.

45. To condone such a situation would provide the Government with an unfair advantage. The Government has the full benefit of all the evidence, but is permitted to withhold that evidence from the Defense. For instance, in its 14 June 2011 Memorandum to the Defense Intelligence Agency, the Government requested that information related to PFC Manning, including documents that discussed harm or damage and any measures considered in response to the alleged leaks, be provided “immediately” to the Government. *See* Enclosure to Prosecution Supplement to Prosecution Proposed Case Calendar. The Government stated that “[t]his request is designed to allow the prosecutors to assess the totality of information available and held as records by other government agencies.” *Id.* Clearly, the Government has had access to information for at least nine months that the Defense has not seen. This gives the Government a nearly one-year head start on the Defense in terms of dealing with, assimilating, and processing the implications of the relevant discovery. *See United States v. Safavian*, 233 F.R.D. 12, 19 (D.D.C. 2005) (“It is insufficient for the Justice Department merely to state that while documents are not currently in its (or the FBI’s) possession it is continuing to make inquiries of GSA employees about e-mails, correspondence and other documents regarding [matters in dispute] during the course of witness interviews.”).

46. As the Defense stated in its Motion to Dismiss All Charges With Prejudice, the Government’s interest in securing a conviction and making an example out of PFC Manning has

clouded the prosecutors' professional judgment. This is apt to happen in high-profile cases. It is no coincidence that many high-profile cases are plagued by serious discovery violations. See *United States v. Koubriti*, 336 F. Supp. 2d 676 (E.D. Mich. 2004) (dismissing charge due to the government's failure to disclose both classified and unclassified material documents during the first post-9/11 terrorism prosecution); see also *United States v. Stevens*, 2009 WL 6525926 (D.D.C. Apr. 7, 2009) (setting aside jury's guilty verdict and dismissing bribery charges against late Senator Ted Stevens given the prosecution's failure to disclose records of an interview favorable to the defense); see also *United States v. Libby*, 429 F. Supp. 2d 1 (D.D.C. 2006) (compelling the prosecution to disclose documents related to certain intelligence briefings during the perjury and obstruction of justice prosecution of former vice presidential advisor I. Lewis "Scooter" Libby); see also *United States v. Safavian*, 233 F.R.D. 12 (D.D.C. 2005) (ordering the government to produce a litany of documents and correspondence related to the obstruction of justice prosecution of former GSA chief of staff, David Safavian); *United States v. Behenna*, 70 M.J. 521 (A. Ct. Crim. App. 2011) (discussing the prosecution's failure to timely disclose a government doctor's opinion regarding forensic evidence favorable to the defense during a highly publicized court-martial for an alleged murder occurring in Iraq), *rev. granted*, 2012 CAAF LEXIS 61 (Jan. 13, 2012) (reviewing the issue of whether the government's failure to disclose the doctor's opinion constituted a violation of the accused's Sixth Amendment right to a fair trial). In this case, there is no remedy short of dismissal with prejudice that could cure the Government's egregious discovery violations.

CONCLUSION

47. For these reasons, and for the reasons outlined in the Defense's Motion to Dismiss All Charges With Prejudice and the Defense's Reply to the Government's Response to the Defense Motion to Compel Discovery, and in accordance with the R.C.M. 701(g)(3)(D), the Defense moves to dismiss all charges in this case with prejudice.

Respectfully submitted,



DAVID EDWARD COOMBS
Civilian Defense Counsel

Appellate Exhibit 43
Enclosure 1
has been entered into the
record as
Appellate Exhibit 8

Appellate Exhibit 43
Enclosure 2
has been entered into the
record as
Appellate Exhibit 16

Appellate Exhibit 43
Enclosure 3
has been entered into the
record as
Appellate Exhibit 26

Appellate Exhibit 43
Enclosure 4
has been entered into the
record as
Appellate Exhibit 31

Appellate Exhibit 43
Enclosure 5
has been entered into the
record as
Appellate Exhibit 42

EMAIL APPENDIX

22 March 2012 Email

Subject: RE: Discovery (UNCLASSIFIED)
From: "Fein, Ashden CPT USA JFHQ-NCR/MDW SJA" (Add as Preferred Sender)
<Ashden.Fein@fhqncr.northcom.mil>
Date: Thu, Mar 22, 2012 5:25 pm
To: "David Coombs" <coombs@armycourtmarshaldefense.com>, "Lind, Denise R COL MIL USA OTJAG" <denise.r.lind.mil@mail.mil>
Cc: "Matthew kemkes" <matthew.kemkes@us.army.mil>, <paul.r.bouchard.mil@mail.mil>, <joshua.j.tooman.mil@mail.mil>, <melissa.s.santiago@us.army.mil>, <dashawn.jefferson@conus.army.mil>, "Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA" <JoDean.Morrow@fhqncr.northcom.mil>, "Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA" <Angel.Overgaard@fhqncr.northcom.mil>, "Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA" <Jeffrey.Whyte@fhqncr.northcom.mil>, "Ford, Arthur D. CW2 USA JFHQ-NCR/MDW SJA" <Arthur.Ford@fhqncr.northcom.mil>, <ashden.fein@us.army.mil>

Ma'am,

As litigated at the motions hearing, the government's position is that classified information does not fall under RCM 701. The information the defense has requested in discovery is classified and the prosecution has no reason to believe it is not classified. Because the information is classified, RCM 701 does not apply (as per RCM 701(a) and (f)), which leaves the prosecution to use the standards under MRE 505 along with Brady and its progeny. The defense provided no authority to apply RCM 701(a)(2) or (6) to classified information and all the authorities only reference unclassified information. The prosecution has relied on MRE 505 and Brady for regulation of what classified information is discoverable.

The United States Government must always weigh the necessity to provide the defense access to classified information and protecting national security. The normal open-file procedures in the military justice process does not and cannot apply to classified information, although in this case the government has turned over as much classified information as possible while still protecting national security. The parties are now at a point where the defense wants access to classified information that the government does not agree to disclose under MRE 505(g)(1). To date, the only classified information the defense has requested which the government has withheld are items subject to the motion to compel, because they are more sensitive than the other classified information previously produced. The prosecution has maintained from the beginning of this case, that it intends to produce all discoverable information, under our legal and ethical obligations.

Just because the defense requests classified information does not mean it is discoverable, as outlined in MRE 505 and relevant case law. The United States understands its Constitutional obligations to ensure a fair trial while balancing national security interests by protecting classified information.

v/r
CPT Fein

16 April 2012 Email

Subject: Hard Drives (EnCase Forensic Images)

Hard Drives (EnCase Forensic Images)

From: "Fein, Ashden MAJ USA JFHQ-NCRMDW SJA" <Ashden.Fein@fhqncr.northcom.mil> (Add as Preferred Sender)
Date: Mon, Apr 16, 2012 3:52 pm
To: "David Coombs" <coombs@armycourtmarshalldefense.com>
Cc: <joshua.j.tooman.mil@mail.mil>, <mellissa.s.santiago.mil@mail.mil>, "Morrow III, JoDean, CPT USA JFHQ-NCRMDW SJA" <JoDean.Morrow@fhqncr.northcom.mil>, "Overgaard, Angel M. CPT USA JFHQ-NCRMDW SJA" <Angel.Overgaard@fhqncr.northcom.mil>, "Whyte, Jeffrey H. CPT USA JFHQ-NCRMDW SJA" <Jeffrey.Whyte@fhqncr.northcom.mil>, "VonElten, Alexander S. 1LT USA JFHQ-NCRMDW SJA" <Alexander.VonElten@fhqncr.northcom.mil>, "Ford, Arthur D. CW2 USA JFHQ-NCRMDW SJA" <Arthur.Ford@fhqncr.northcom.mil>

David,

After consultation with the government forensic experts, it appears that out of the 14 hard drives that were identified to be present in the TOC or SCIF, 2 drives are completely inoperable, 7 drives are wiped, 4 drives have file structures present, and 1 drive is partially wiped. In total, only 5 drives have any information that could answer your request and ultimately the Court's order, dated 23 March 2012.

Based on this information and in an effort to continue producing as much information in discovery as possible, regardless of classification, the United States is willing to produce forensic copies of the 5 drives to the defense, but only after receiving authorization from relevant OCAs, if classified information is identified on the drives. In order to make this happen, we will have our forensic experts continue their examination and then pass the information to the security experts to start a review. Our goal is to have the drives examined and approved for release by 18 May 2012, the Court's deadline for the other matters in the defense motion to compel.

The United States does not acknowledge any of the defense's arguments or stated interpretation of the relevant authorities. The United States maintains that a complete search of these drives is not material to the preparation of the defense, regardless of their classification. Additionally, the United States has never maintained that the forensic computer exams will take an extended period, but rather it would take weeks for the security experts to review the 14 hard drives for classified information and the prosecution to obtain needed approvals. Now knowing that only five drives are at issue (the fifth being partially wiped), this process should not be too onerous for our security experts and they should be able to complete everything, including obtaining approvals, if any, within the next 30 days.

Please let us know whether this is acceptable and we will notify the Court. Additionally, please let us know whether you still require your forensic experts to travel this week or next week for the motions hearing.

v/r
Ashden

Appellate Exhibit 43
Enclosure 8
is the oral argument
dated 15 March 2012

Appellate Exhibit 43
Enclosure 9
has been entered into the
record as
Appellate Exhibit 12

17 April 2012

MEMORANDUM FOR RECORD

SUBJECT: Security Expert Review of Defense Motions

1. I hereby certify that I have reviewed the following Defense motion for the presence of classified information:

a) Defense Reply to Prosecution Response to Defense Motion to Dismiss All Charges with Prejudice

I do not believe that this motion contains classified information or information that a reasonable person could believe to be classified.

2. The point of contact for this memorandum is the undersigned at (443) 861-9673.



CHARLES J. GANIEL
Command, SSO
HQ ATEC G-2/3/7

IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES)

v.)

MANNING, Bradley E., PFC)

U.S. Army, xxx-xx-)

Headquarters and Headquarters Company, U.S.)

Army Garrison, Joint Base Myer-Henderson Hall,)

Fort Myer, VA 22211)

**DEFENSE PROPOSED CASE
MANAGEMENT ORDER**

DATED: 6 April 2012

1. The proposed calendar is based upon several assumptions.

a. That the parties will have two weeks from any Article 39(a) to file a motion, two weeks to file a response, one week to file a reply and that the Court will have an additional week to consider the filings prior to the subsequent Article 39(a).

b. That the parties will update and propose a revised case calendar after each Article 39(a) to ensure that the order and timing of motions and other matters being considered makes sense and provides for the orderly administration of the case.

2. Per the Court's instructions, the Defense has adopted the Prosecution Proposed Calendar. The prosecution separated the projected issues into seven (7) phases. The Defense has combined phases 3 and 4 into one phase, and combined the consideration of motions from different phases into the same phase in order to avoid any unnecessary delay of the proceedings.

a. **Phase 1. Completed, with the exception of the Compel Discovery Motion, Motion to Dismiss, and Renewal of Bill of Particulars Request**

b. **Phase 2(a). Legal Motions, excluding Evidentiary Issues (29 March 2012 – 26 April 2012)**¹

(1) **Defense Motion to Dismiss Article 104 Offense**

(A) Filing: 29 March 2012

(B) Response: 12 April 2012

(C) Reply: 17 April 2012

(D) Article 39(a): 24-26 April 2012

(2) **Defense Motion to Dismiss Specification 1 of Charge II**

(A) Filing: 29 March 2012

(B) Response: 12 April 2012

¹ The Defense will not be filing an Unlawful Command Influence motion; an Improper Referral motion, or a Jurisdictional Defects motion.

- (C) Reply: 17 April 2012
- (D) Article 39(a): 24-26 April 2012

(3) Defense Unreasonable Multiplication of Charges Motion

- (A) Filing: 29 March 2012
- (B) Response: 12 April 2012
- (C) Reply: 17 April 2012
- (D) Article 39(a): 24-26 April 2012

(4) Defense Motion to Dismiss All Charges and Specifications with Prejudice

- (A) Filing: 15 March 2012 (already filed)
- (B) Response: 12 April 2012
- (C) Reply: 17 April 2012
- (D) Article 39(a): 24-26 April 2012

(5) Defense Renewal for Motion to Compel Discovery of Computers

- (A) Filing: 29 March 2012
- (B) Response: 12 April 2012
- (C) Reply: 17 April 2012
- (D) Article 39(a): 24-26 April 2012

(6) Defense Renewal for Bill of Particulars

- (A) Filing: 6 April 2012
- (B) Response: 17 April 2012
- (C) Reply: N/A
- (D) Article 39(a): 24-26 April 2012

(7) Reciprocal Discovery Requests

- (A) Filing: 29 March 2012
- (B) Response: 12 April 2012
- (C) Reply: 17 April 2012
- (D) Article 39(a): 24-26 April 2012

(8) MRE 404(b) Disclosures

- (A) Filing: 6 April 2012
- (B) Response: N/A

(9) Government Motion for Appropriate Relief to Preclude Actual Harm or Damage from the Merits Portion of the Trial

- (A) Filing: 29 March 2012
- (B) Response: 12 April 2012
- (C) Reply: 17 April 2012
- (D) Article 39(a): 24-26 April 2012

(10) Updated Proposed Case Calendar²

- (A) Filing: 12 April 2012
- (B) Response: 17 April 2012 (if applicable)
- (C) Reply: N/A
- (D) Article 39(a): 24-26 April 2012

(11) Government Notification to Court of Whether it Anticipates Limited Disclosure or Claim of Privilege

- (A) Filing: 20 April 2012
- (B) Response: N/A
- (C) Reply: N/A
- (D) Article 39(a): 24-26 April 2012

c. Phase 2(b). Legal Motions, excluding Evidentiary Issues (10 May 2012 – 8 June 2012)

(1) Defense Motion to Dismiss All Charged Offenses under 18 U.S.C. 793(e)

- (A) Filing: 10 May 2012
- (B) Response: 24 May 2012
- (C) Reply: 31 May 2012
- (D) Article 39(a): 7-8 June 2012

(2) Defense Motion to Dismiss All Charged Offenses under 18 U.S.C. 1030(a)(1)

- (A) Filing: 10 May 2012
- (B) Response: 24 May 2012
- (C) Reply: 31 May 2012
- (D) Article 39(a): 7-8 June 2012

(3) Proposed Members Instructions, including elements for all Charged Offenses

- (A) Filing: 10 May 2012
- (B) Response: 24 May 2012
- (C) Reply: 31 May 2012
- (D) Article 39(a): 7-8 June 2012

(4) Motion for Proposed Lesser Included Offenses³

- (A) Filing: 10 May 2012
- (B) Response: 24 May 2012
- (C) Reply: 31 May 2012
- (D) Article 39(a): 7-8 June 2012

² The Defense envisions the parties submitting updated proposed case calendars prior to each Article 39(a). This will enable the Court and the parties to have flexibility in the issues that we address. Additionally, this will enable the Court to be able to announce the date and subject matter for the next Article 39(a).

³ If the parties and Court can agree on the relevant LIOs, this may not be a required motion.

(5) Defense Motion for Appropriate Relief to Exclude Uncharged Misconduct Under MRE 404(b)

- (A) Filing: 10 May 2012
- (B) Response: 24 May 2012
- (C) Reply: 31 May 2012
- (D) Article 39(a): 7-8 June 2012

(6) Government Notification of Limited Disclosure or Claim of Privilege and Litigation Concerning any Proposed Substitutions (including In Camera Review)

- (A) Filing and Notice to Defense: 18 May 2012
- (B) Response: 31 May 2012
- (C) Reply: N/A
- (D) Article 39(a): 7-8 June 2012

(7) Production of Compelled Discovery Classified and Unclassified

- (A) Date: 13 July 2012

d. Phase 3. Evidentiary Issues not Involving Classified Information under MRE 505 (22 June 2012 – 20 July 2012)

(1) Requests for Judicial Notice

- (A) Filing: 22 June 2012
- (B) Response: 6 July 2012
- (C) Reply: 13 July 2012
- (D) Article 39(a): 19-20 July 2012

(2) Witness Lists Exchange

- (A) Filing: 19 July 2012⁴

(3) Motion to Suppress

- (A) Filing: 22 June 2012
- (B) Response: 6 July 2012
- (C) Reply: 13 July 2012
- (D) Article 39(a): 19-20 July 2012

(4) Compel Discovery #2⁵

- (A) Filing: 22 June 2012
- (B) Response: 6 July 2012
- (C) Reply: 13 July 2012
- (D) Article 39(a): 19-20 July 2012

⁴ The Defense will need to have access to compelled discovery in order to identify needed witnesses. The Government should provide notice of its intent to oppose production of any witness by 26 July 2012.

⁵ The Government believes that the Defense will file at least one additional motion to compel discovery for unclassified information based upon additional information learned by that point. The Defense does not know if this is accurate, but accepts the Government's representation as a possibility.

(5) Motion in Limine

- (A) Filing: 22 June 2012
- (B) Response: 6 July 2012
- (C) Reply: 13 July 2012
- (D) Article 39(a): 19-20 July 2012

(6) Privileges

- (A) Filing: 22 June 2012
- (B) Response: 6 July 2012
- (C) Reply: 13 July 2012
- (D) Article 39(a): 19-20 July 2012

(7) Defense Notice of Intent to Disclose Classified Information under MRE 505(h)

- (A) Filing: 20 July 2012

(8) Defense Notice of Accused's Forum Selection and Notice of Pleas in Writing

- (A) Filing: 20 July 2012⁶

e. Phase 4. Evidentiary Issues Involving Both Unclassified and Classified Information under MRE 505 and Miscellaneous Motions (3 August 2012 – 31 August 2012)⁷

(1) Compel Experts

- (A) Filing: 3 August 2012
- (B) Response: 17 August 2012
- (C) Reply: 24 August 2012
- (D) Article 39(a): 29-31 August 2012

(2) Compel Witnesses

- (A) Filing: 3 August 2012
- (B) Response: 17 August 2012
- (C) Reply: 24 August 2012
- (D) Article 39(a): 29-31 August 2012

(3) Defense Article 13 Motion

- (A) Filing: 27 July 2012⁸

⁶ Pursuant to the Government's request, this date provides the United States with forum selection and notice of pleas at least sixty days prior to trial in order to coordinate for extended special duty and travel.

⁷ The Government requests two separate time periods to pre-authenticate evidence; pre-admit evidence; and pre-qualify expert witnesses. The Court should deny the Government's request to pre-authenticate and admit numerous pieces of evidence and foundational testimony in advance of the court-martial. Instead, the Defense requests that the Court consider all evidence on an individual basis during the court-martial. However, if the Court is inclined to pre-authenticate evidence, pre-admit evidence, and pre-qualify expert witnesses, the Defense would request that the 27th and 28th of August be set aside to accomplish this task.

⁸ The filing date is a week earlier for the Defense in order to provide the United States with one additional week for its response.

- (B) Response: 17 August 2012
- (C) Reply: 24 August 2012
- (D) Article 39(a): 29-31 August 2012

(4) Defense Speedy Trial – Article 10 Motion

- (A) Filing: 27 July 2012⁹
- (B) Response: 17 August 2012
- (C) Reply: 24 August 2012
- (D) Article 39(a): 29-31 August 2012

(5) Any Additional Motion Without an Identified Deadline

- (A) Filing: 3 August 2012
- (B) Response: 17 August 2012
- (C) Reply: 24 August 2012
- (D) Article 39(a): 29-31 August 2012

(6) Member Proposed Questionnaires

- (A) Filing: 3 August 2012
- (B) Response: 17 August 2012
- (C) Reply: 24 August 2012
- (D) Article 39(a): 29-31 August 2012

(7) Government Notification of Limited Disclosure or Claim of Privilege and Litigation Concerning any Proposed Substitutions (including In Camera Review) for Compelled Discovery #2¹⁰

- (A) Filing: 3 August 2012
- (B) Response: 17 August 2012
- (C) Reply: 24 August 2012
- (D) Article 39(a): 29-31 August 2012

(8) Production of Compelled Discovery for Defense Motion to Compel Discovery #2 that is not the subject of a Limited Disclosure Request, Proposed Substitution, or Claim of Privilege

- (A) Filing: 17 August 2012¹¹

f. Phase 5. Grunden and Panel Member Issues (24 August 2012 – 21 September 2012)

(1) Grunden Hearing for all Classified Information

- (A) Filing: 24 August 2012
- (B) Response: 7 September 2012
- (C) Reply: 14 September 2012

⁹ The filing date is a week earlier for the Defense in order to provide the United States with one additional week for its response.

¹⁰ This motion is only necessary if the Defense files a second motion to compel discovery.

¹¹ This date is only applicable if the Defense files a second motion to compel discovery.

(D) Article 39(a): 21 September 2012¹²

(2) **Voir Dire Questions**

(A) Filing: 14 September 2012

(B) Response: N/A

(C) Reply: N/A

(D) Article 39(a): 21 September 2012

(3) **Flyer Due**

(A) Filing: 14 September 2012

(B) Response: N/A

(C) Reply: N/A

(D) Article 39(a): 21 September 2012

g. **Phase 6. Trial by Members (21 September 2012 – 12 October 2012)**

(1) Article 39(a): 21 September 2012

(2) Voir Dire: 24 September 2012

(3) Trial: 24 September – 28 September 2012; 1 October – 5 October; 8 October – 12 October 2012



DAVID EDWARD COOMBS
Civilian Defense Counsel

¹² The Court will also, if necessary, address any classified discovery that is the subject of a second motion to compel discovery by the Defense.

From: David Coombs
To: Lind, Denise R COL MIL USA OTJAG
Cc: "Kemkes, Matthew J MA1 USARMY (US)"; "Bouchard, Paul R CPT USARMY (US)"; "Santiago, Melissa S CW2 USARMY (US)"; Morrow, III, JoDean, CPT USA JFHO-NCR/MDW SJA; Overgaard, Angel M, CPT USA JFHO-NCR/MDW SJA; Whyte, Jeffrey H, CPT USA JFHO-NCR/MDW SJA; Ford, Arthur D, CW2 USA JFHO-NCR/MDW SJA; ashden.fein@us.army.mil; Williams, Patricia CIV JFHO-NCR/MDW SJA; Fein, Ashden MA1 USA JFHO-NCR/MDW SJA; Jefferson, DaShawn MSG MIL USA OTJAG
Subject: Updated Case Calendar
Date: Friday, April 06, 2012 4:04:43 PM
Attachments: Def. Updated Case Calendar.pdf

Ma'am,

Please find attached the Defense's updated proposed case calendar.

v/r
David

David E. Coombs, Esq.
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UNITED STATES OF AMERICA)

v.)

Manning, Bradley E.)
PFC, U.S. Army,)
HHC, U.S. Army Garrison,)
Joint Base Myer-Henderson Hall)
Fort Myer, Virginia 22211)

Prosecution Proposed
Case Calendar
Update

12 April 2012

1. The proposed calendar is based upon several assumptions. To the extent these assumptions prove to be incorrect or too ambitious, the schedule will be correspondingly longer. These assumptions are:

a. The same assumptions listed in the Prosecution's Proposed Case Calendar and Update listed in Appellate Exhibits I and XX.

b. The Court is currently scheduling Article 39(a) sessions with the following default schedule: two weeks for parties to file motions; two weeks for parties to file responses; five days for parties to file replies; and one week for the Court to review all pleadings before the start of the motions hearing.

c. The command will expend less funds by three-day long motions hearings starting no sooner than Wednesday of each week because two days are required for infrastructure setup prior to the beginning of the hearing. Ensuring all days are duty days minimizes cost based on contracted work and civilian salaries.

d. The parties do not file motions outside this motions calendar; otherwise, this calendar will likely expand and move each phase to a later date.

2. Prosecution Proposed Calendar. The prosecution initially separated the projected issues into seven phases. Based on the defense proposed schedule, Phase 2 has been separated into two separate phases—Phases 2(a) and 2(b).

a. Phase 1. Immediate Action (21 February 2012 - 16 March 2012)

b. Phase 2(a). Legal Motions, excluding Evidentiary Issues (29 March 2012 - 26 April 2012)

- (1) **Defense Motion to Dismiss all Charges and their Specifications with Prejudice**
(A) Filing: 15 March 2012 (filed early)
(B) Response: 12 April 2012
(C) Reply: 17 April 2012
(D) Article 39(a): 24-26 April 2012

(2) **Government Motion for Appropriate Relief to Preclude Actual Harm or Damage from the Merits Portion of Trial**

- (A) Filing: 29 March 2012
 - (B) Response: 12 April 2012
 - (C) Reply: 17 April 2012
 - (D) Article 39(a): 24-26 April 2012
- (3) **Defense Motion to Dismiss Article 104 Offense**
- (A) Filing: 29 March 2012
 - (B) Response: 12 April 2012
 - (C) Reply: 17 April 2012
 - (D) Article 39(a): 24-26 April 2012
- (4) **Defense Motion to Dismiss Specification 1 of Charge II**
- (A) Filing: 29 March 2012
 - (B) Response: 12 April 2012
 - (C) Reply: 17 April 2012
 - (D) Article 39(a): 24-26 April 2012
- (5) **Defense Unreasonable Multiplication of Charges Motion**
- (A) Filing: 29 March 2012
 - (B) Response: 12 April 2012
 - (C) Reply: 17 April 2012
 - (D) Article 39(a): 24-26 April 2012
- (6) **Defense Renewal for Motion to Compel Discovery of Computers**
- (A) Filing: 29 March 2012
 - (B) Response: 12 April 2012
 - (C) Reply: 17 April 2012
 - (D) Article 39(a): 24-26 April 2012
- (7) **Defense Renewal for Bill of Particulars**
- (A) Filing: 6 April 2012
 - (B) Response: 17 April 2012
 - (C) Reply: N/A
 - (D) Article 39(a): 24-26 April 2012
- (8) **Reciprocal Discovery Requests**
- (A) Filing: 29 March 2012
 - (B) Response: 12 April 2012
- (9) **MRE 404(b) Disclosures**
- (A) Filing: 6 April 2012
- (10) **Updated Proposed Case Calendar**
- (A) Filing: 12 April 2012
 - (B) Response: 17 April 2012
 - (C) Reply: N/A

(D) Article 39(a): 24-26 April 2012

(11) Results of Hard Drive Searches to Defense in Response to Defense Motion to Compel Discovery #1

(A) Date: 20 April 2012

(12) Government Notification to Court Whether Relevant Files Exist with DOS, FBI, DIA, ONCIX, and CIA

(A) Filing: 20 April 2012

(13) Government Notification to Court of Whether it Anticipates Limited Disclosure or Claim of Privilege, based on (12) above

(A) Filing: 20 April 2012

c. Phase 2(b). Legal Motions, excluding Evidentiary Issues (10 May 2012 - 8 June 2012)

(1) Defense Motion to Dismiss All Charged Offenses under 18 U.S.C. 793(e)

(A) Filing: 10 May 2012

(B) Response: 24 May 2012

(C) Reply: 30 May 2012

(D) Article 39(a): 6-8 June 2012

(2) Defense Motion to Dismiss All Charged Offenses under 18 U.S.C. 1030(a)(1)

(A) Filing: 10 May 2012

(B) Response: 24 May 2012

(C) Reply: 30 May 2012

(D) Article 39(a): 6-8 June 2012

(3) Government Motion for Proposed Lesser Included Offenses

(A) Filing: 10 May 2012

(B) Response: 24 May 2012

(C) Reply: 30 May 2012

(D) Article 39(a): 6-8 June 2012

(4) Updated Proposed Case Calendar

(A) Filing: 10 May 2012

(B) Response: 24 May 2012

(C) Reply: 30 May 2012

(D) Article 39(a): 6-8 June 2012

(5) Disclosure of Unclassified Results of 3 Damage Assessment Searches to Defense in Response to the Court's Ruling, 30 March 2012

(A) Filing: 18 May 2012

(6) Disclosure under RCM 701(g)(2) or MRE 505(g)(2) of all Information (Unclassified and Classified) to the Court in Response to the Court's Ruling, 30 March 2012

(A) Filing: 18 May 2012

(7) Government Filing for In Camera Proceeding IAW MRE 505(i) with Notice to Defense (if Privilege is Claimed) in Response to the Court's Ruling, 30 March 2012

(A) Filing: 18 May 2012

(B) Response: 1 June 2012

(C) Reply: N/A

(D) Article 39(a): 6-8 June 2012

(8) Witness Lists Exchanged

(A) Filing: 4 June 2012

(B) Government Response: 11 June 2012¹

d. Phase 3. Evidentiary Issues *not* Involving Classified Information under MRE 505 (22 June 2012 - 20 July 2012)

(1) Defense Motion to Compel Discovery #2

(A) Filing: 22 June 2012

(B) Response: 6 July 2012

(C) Reply: 11 July 2012

(D) Article 39(a): 18-20 July 2012

(2) Government Motion to Compel Discovery

(A) Filing: 22 June 2012

(B) Response: 6 July 2012

(C) Reply: 11 July 2012

(D) Article 39(a): 18-20 July 2012

(3) Motions *in Limine*

(A) Filing: 22 June 2012

(B) Response: 6 July 2012

(C) Reply: 11 July 2012

(D) Article 39(a): 18-20 July 2012

(4) Motions to Suppress

(A) Filing: 22 June 2012

(B) Response: 6 July 2012

(C) Reply: 11 July 2012

(D) Article 39(a): 18-20 July 2012

¹ The defense witness list should be provided to the United States prior to motions to compel witnesses and experts. Those motions should occur before the defense must provide MRE 505(h) notification, based on the defense likely eliciting classified information from witnesses.

- (5) **Pre-Admit Evidence**
 - (A) Filing: 22 June 2012
 - (B) Response: 6 July 2012
 - (C) Reply: 11 July 2012
 - (D) Article 39(a): 18-20 July 2012
- (6) **Pre-Authenticate Evidence**
 - (A) Filing: 22 June 2012
 - (B) Response: 6 July 2012
 - (C) Reply: 11 July 2012
 - (D) Article 39(a): 18-20 July 2012
- (7) **Requests for Judicial Notice**
 - (A) Filing: 22 June 2012
 - (B) Response: 6 July 2012
 - (C) Reply: 11 July 2012
 - (D) Article 39(a): 18-20 July 2012
- (8) **Privileges**
 - (A) Filing: 22 June 2012
 - (B) Response: 6 July 2012
 - (C) Reply: 11 July 2012
 - (D) Article 39(a): 18-20 July 2012
- (9) **Proposed Members Instructions for all Charged Offenses**
 - (A) Filing: 22 June 2012²
 - (B) Response: 6 July 2012
 - (C) Reply: 11 July 2012
 - (D) Article 39(a): 18-20 July 2012
- (10) **Compel Experts**
 - (A) Filing: 22 June 2012
 - (B) Response: 6 July 2012
 - (C) Reply: 11 July 2012
 - (D) Article 39(a): 18-20 July 2012
- (11) **Compel Witnesses**
 - (A) Filing: 22 June 2012
 - (B) Response: 6 July 2012
 - (C) Reply: 11 July 2012
 - (D) Article 39(a): 18-20 July 2012

² Since these instructions depend on the outcome of the motions to dismiss in Phase 2, the United States recommends scheduling this motion during Phase 3.

(12) Defense Notice of Intent to Disclose Classified Information under MRE 505(h)(1)

(A) Filing: 22 June 2012³

e. Phase 4. Evidentiary Issues Involving Both Unclassified and Classified Information under MRE 505 (3 August 2012 – 4 September 2012)⁴

(1) Motions in Limine

- (A) Filing: 3 August 2012
- (B) Response: 17 August 2012
- (C) Reply: 22 August 2012
- (D) Article 39(a): 29-31 August 2012

(3) Motions to Suppress

- (A) Filing: 3 August 2012
- (B) Response: 17 August 2012
- (C) Reply: 22 August 2012
- (D) Article 39(a): 29-31 August 2012

(4) Pre-Admit Evidence

- (A) Filing: 3 August 2012
- (B) Response: 17 August 2012
- (C) Reply: 22 August 2012
- (D) Article 39(a): 29-31 August 2012

(5) Pre-Authenticate Evidence

- (A) Filing: 3 August 2012
- (B) Response: 17 August 2012
- (C) Reply: 22 August 2012
- (D) Article 39(a): 29-31 August 2012

(6) Litigation Concerning MRE 505(h) and MRE 505(i)⁵

- (A) Filing: 3 August 2012
- (B) Response: 17 August 2012

³ The defense should provide notice under MRE 505(h) when it files its witness list, so that the United States may start evaluating the list and more efficiently process the request through relevant Original Classification Authorities. If the privilege is required to be invoked, then this will provide the United States sufficient time to complete the necessary classification reviews, prior to Phase 4.

⁴ This process will likely require the military judge to review classified information within a special facility or under special handling procedures. Additionally, this process will likely take some time for the military judge to make her rulings on all classified information evidentiary motions.

⁵ This pretrial litigation encompasses any judicial review of discoverable information that the United States previously listed in its proposed case calendars. As of today, the United States anticipates the Court requiring fifteen duty days to review material; however as the prosecution continues its due diligence searches, the Court might require more time.

- (C) Reply: 22 August 2012
- (D) Article 39(a): 29-31 August 2012

- (7) **Production of Compelled Discovery for Defense Motion to Compel Discovery #2**
(A) Date: 17 August 2012⁶

- (8) **Production of Compelled Discovery for Government Motion to Compel Discovery**
(A) Date: 14 August 2012

- (9) **Defense Notice of Accused's Forum Selection and Notice of Pleas in Writing**
(A) Date: 4 September 2012⁷

f. **Phase 5. Miscellaneous Motions (14 September 2012 – 19 October 2012)**

- (1) **Grunden Hearing for all Classified Information**
(A) Filing: 14 September 2012
(B) Response: 28 September 2012
(C) Reply: 3 October 2012
(D) Article 39(a): 16-19 October 2012

- (2) **Article 13**
(A) Filing: 7 September 2012⁸
(B) Response: 28 September 2012
(C) Reply: 3 October 2012
(D) Article 39(a): 16-19 October 2012

- (3) **Speedy Trial, including Article 10**
(A) Filing: 7 September 2012⁹
(B) Response: 28 September 2012
(C) Reply: 3 October 2012
(D) Article 39(a): 16-19 October 2012

- (4) **Pre-Qualify Experts**

⁶ This date is proposed for unclassified information. If the information is classified, the United States will evaluate whether it should request a continuance, in order to properly determine how many original classification authorities must approve production or an alternative under MRE 505.

⁷ If the accused selects a panel, the United States proposes the panel be notified no less than sixty days prior to trial, in order to coordinate for extended special duty and travel.

⁸ The filing date of one week earlier for the defense motions is in accordance with their schedule to give the United States the necessary time to respond.

⁹ The filing date of one week earlier for the defense motions is in accordance with their schedule to give the United States the necessary time to respond.

- (A) Filing: 14 September 2012
- (B) Response: 28 September 2012
- (C) Reply: 3 October 2012
- (D) Article 39(a): 16-19 October 2012

(5) Any Additional Motion that does not have an Identified Deadline

- (A) Filing: 14 September 2012
- (B) Response: 28 September 2012
- (C) Reply: 3 October 2012
- (D) Article 39(a): 16-19 October 2012

(6) Proposed Questionnaires

- (A) Filing: 14 September 2012
- (B) Response: 28 September 2012
- (C) Reply: 3 October 2012
- (D) Article 39(a): 16-19 October 2012

g. Phase 6. Member Selection (22 October 2012 – 31 October 2012)

(1) Questionnaires to Panel Members

- (A) Filing: 22 October 2012
- (B) Response: 25 October 2012
- (C) Reply: N/A
- (D) Due to Defense: 27 October 2012

(2) Voir Dire Questions

- (A) Filing: 31 October 2012
- (B) Response: N/A
- (C) Article 39(a): N/A

(3) Flyer Due

- (A) Filing: 31 October 2012

h. Phase 7. Trial by Members (5 November 2012 – 23 November 2012)

- (1) Article 39(a): 5 November 2012
- (2) Voir Dire: 6 November 2012
- (3) Trial: 6-9 November 2012; 12-16 November 2012; 19-23 November 2012


ASHDEN FEIN
MAJ, JA
Trial Counsel

UNITED STATES OF AMERICA)

v.)

Manning, Bradley E.)
PFC, U.S. Army,)
HHC, U.S. Army Garrison,)
Joint Base Myer-Henderson Hall)
Fort Myer, Virginia 22211)

Prosecution Proposed
Case Calendar Update,
Dated 12 April 2012
Supplement

20 April 2012

1. The proposed separation of unclassified and classified evidentiary motions is based upon several assumptions. To the extent these assumptions prove to be incorrect or too ambitious, the schedule will be correspondingly longer. These assumptions are:

a. The same assumptions listed in the Prosecution Proposed Case Calendar (Appellate Exhibit I), Prosecution Proposed Case Calendar Update (Appellate Exhibit XX), and Prosecution Proposed Case Calendar Update, dated 12 April 2012.

b. The United States must be prepared to authenticate all evidence and qualify all experts without planning on the defense stipulating to authenticity and admissibility of evidence or qualifications of any expert witness.

c. The United States anticipates the Court closing pretrial sessions involving classified evidence, based on the likely testimony and argument, to include multiple motions to suppress, extensive litigation concerning MRE 505(h) and MRE 505(i), motions for preliminary rulings on admissibility of evidence, and motions for rulings on qualifying experts.

2. The United States anticipates seeking preliminary rulings of admissibility for the below categories of evidence to expedite the court-martial.

a. **Physical Evidence.**

(1) **Unclassified Physical Evidence.** The United States intends on introducing approximately two items of physical evidence, to include the hard drive for the supply room NIPR computer and hard drive for a NIPR computer in the SCIF. The United States anticipates approximately fifteen different witnesses to authenticate and admit unclassified physical evidence.

(2) **Classified Physical Evidence.** The United States intends on introducing approximately fifteen items of physical evidence containing classified information, to include multiple items of digital media belonging to the accused, and various classified government computer hard drives. The United States anticipates approximately twenty different witnesses to authenticate and admit classified physical evidence.

b. **Documentary Evidence.**

(1) **Unclassified Documentary Evidence.** The United States intends on introducing approximately sixty-five unclassified records or documents, to include various computer activity logs and digital files. Additionally, the United States intends to introduce approximately thirteen summaries based on these records, which will require. The United States anticipates approximately twenty witnesses to authenticate and admit this evidence.

(2) **Classified Documentary Evidence.** The United States intends on introducing over three hundred classified records or documents, to include charged documents, WikiLeaks published documents, various computer activity logs, and chat logs. Additionally, the United States intends to introduce approximately fifteen summaries based on these records. The United States anticipates nearly fifteen witnesses in order to authenticate and admit this evidence, and the majority of this process will be in closed session.

3. The United States anticipates establishing, pretrial, the qualifications of experts in the below categories of testimony, including *Daubert* hearings.

a. **Expert Witnesses with Unclassified Testimony.** The United States will likely seek to qualify approximately fifteen experts focused on unclassified evidence to expedite the trial.

b. **Expert Witnesses with Classified Testimony.** The United States will likely seek to qualify approximately twenty experts focused on classified evidence to expedite the trial and the majority of this qualification will be in closed session, based on the experts' current and past duties, education, and experiences.



ASHDEN FEIN
MAJ, JA
Trial Counsel

UNITED STATES OF AMERICA)

v.)

Manning, Bradley E.)
PFC, U.S. Army,)
HHC, U.S. Army Garrison,)
Joint Base Myer-Henderson Hall)
Fort Myer, Virginia 22211)

Draft
Case Calendar
Update

16 April 2012

1. The Court is currently scheduling Article 39(a) sessions with the following default schedule at the request of the parties: two weeks for parties to file motions; two weeks for parties to file responses; five days for parties to file replies; and one week for the Court to review all pleadings before the start of the motions hearing. The time for filing replies was added after the first Article 39(a) session on 15-16 March 2012 because the Court received reply briefs the day before that session, the parties desire to continue to file replies, and the Court requires time to consider them.

a. Phase 1. Immediate Action (21 February 2012 - 16 March 2012)

b. Phase 2(a). Legal Motions excluding Evidentiary Issues (29 March 2012 - 26 April 2012)

(1) Defense Motion to Dismiss all Charges and their Specifications with Prejudice

- (A) Filing: 15 March 2012 (filed early)
- (B) Response: 12 April 2012
- (C) Reply: 17 April 2012
- (D) Article 39(a): 24-26 April 2012

(2) Government Motion for Appropriate Relief to Preclude Actual Harm or Damage from the Merits Portion of Trial

- (A) Filing: 29 March 2012
- (B) Response: 12 April 2012
- (C) Reply: 17 April 2012
- (D) Article 39(a): 24-26 April 2012

(3) Defense Motion to Dismiss Article 104 Offense

- (A) Filing: 29 March 2012
- (B) Response: 12 April 2012
- (C) Reply: 17 April 2012
- (D) Article 39(a): 24-26 April 2012

(4) Defense Motion to Dismiss Specification 1 of Charge II

- (A) Filing: 29 March 2012
- (B) Response: 12 April 2012
- (C) Reply: 17 April 2012
- (D) Article 39(a): 24-26 April 2012

- (5) **Defense Unreasonable Multiplication of Charges Motion**
 - (A) Filing: 29 March 2012
 - (B) Response: 12 April 2012
 - (C) Reply: 17 April 2012
 - (D) Article 39(a): 24-26 April 2012
- (6) **Defense Renewal for Motion to Compel Discovery of Computers**
 - (A) Filing: 29 March 2012
 - (B) Response: 12 April 2012
 - (C) Reply: 17 April 2012
 - (D) Article 39(a): 24-26 April 2012
- (7) **Defense Renewal for Bill of Particulars**
 - (A) Filing: 6 April 2012
 - (B) Response: 17 April 2012
 - (C) Reply: N/A
 - (D) Article 39(a): 24-26 April 2012
- (8) **Reciprocal Discovery Requests**
 - (A) Filing: 29 March 2012
 - (B) Response: 12 April 2012
- (9) **MRE 404(b) Disclosures**
 - (A) Filing: 6 April 2012
- (10) **Updated Proposed Case Calendar**
 - (A) Filing: 12 April 2012
 - (B) Response: 17 April 2012
 - (C) Reply: N/A
 - (D) Article 39(a): 24-26 April 2012
- (11) **Results of Hard Drive Searches to Defense in Response to Defense Motion to Compel Discovery #1**
 - (A) Date: 20 April 2012
- (12) **Government Notification to Court Whether Relevant Files Exist with DOS, FBI, DIA, ONCIX, and CIA**
 - (A) Filing: 20 April 2012
- (13) **Government Notification to Court of Whether it Anticipates Limited Disclosure or Claim of Privilege, based on (12) above**
 - (A) Filing: 20 April 2012
- (14) **Protective Order – Defense Publication of Its Motions**

INSTRUCTIONS FOR PREPARING AND ARRANGING RECORD OF TRIAL

USE OF FORM - Use this form and MCM, 1984, Appendix 14, will be used by the trial counsel and the reporter as a guide to the preparation of the record of trial in general and special court-martial cases in which a verbatim record is prepared. Air Force uses this form and departmental instructions as a guide to the preparation of the record of trial in general and special court-martial cases in which a summarized record is authorized.

Army and Navy use DD Form 491 for records of trial in general and special court-martial cases in which a summarized record is authorized. Inapplicable words of the printed text will be deleted.

COPIES - See MCM, 1984, RCM 1103(g). The convening authority may direct the preparation of additional copies.

ARRANGEMENT - When forwarded to the appropriate Judge Advocate General or for judge advocate review pursuant to Article 64(a), the record will be arranged and bound with allied papers in the sequence indicated below. Trial counsel is responsible for arranging the record as indicated, except that items 6, 7, and 15e will be inserted by the convening or reviewing authority, as appropriate, and items 10 and 14 will be inserted by either trial counsel or the convening or reviewing authority, whichever has custody of them.

1. Front cover and inside front cover (chronology sheet) of DD Form 490.
2. Judge advocate's review pursuant to Article 64(a), if any.
3. Request of accused for appellate defense counsel, or waiver/withdrawal of appellate rights, if applicable.
4. Briefs of counsel submitted after trial, if any (Article 38(c)).
5. DD Form 494, "Court-Martial Data Sheet."
6. Court-martial orders promulgating the result of trial as to each accused, in 10 copies when the record is verbatim and in 4 copies when it is summarized.
7. When required, signed recommendation of staff judge advocate or legal officer, in duplicate, together with all clemency papers, including clemency recommendations by court members.

8. Matters submitted by the accused pursuant to Article 60 (MCM, 1984, RCM 1105).

9. DD Form 458, "Charge Sheet" (unless included at the point of arraignment in the record).

10. Congressional inquiries and replies, if any.

11. DD Form 457, "Investigating Officer's Report," pursuant to Article 32, if such investigation was conducted, followed by any other papers which accompanied the charges when referred for trial, unless included in the record of trial proper.

12. Advice of staff judge advocate or legal officer, when prepared pursuant to Article 34 or otherwise.

13. Requests by counsel and action of the convening authority taken thereon (e.g., requests concerning delay, witnesses and depositions).

14. Records of former trials.

15. Record of trial in the following order:

- a. Errata sheet, if any.
- b. Index sheet with reverse side containing receipt of accused or defense counsel for copy of record or certificate in lieu of receipt.
- c. Record of proceedings in court, including Article 39(a) sessions, if any.
- d. Authentication sheet, followed by certificate of correction, if any.
- e. Action of convening authority and, if appropriate, action of officer exercising general court-martial jurisdiction.
- f. Exhibits admitted in evidence.
- g. Exhibits not received in evidence. The page of the record of trial where each exhibit was offered and rejected will be noted on the front of each exhibit.
- h. Appellate exhibits, such as proposed instructions, written offers of proof or preliminary evidence (real or documentary), and briefs of counsel submitted at trial.